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RAILWAY ACCIDENT LAW.

THE LIABILITY OF RAILWAYS

FOR

INJURIES TO THE PERSON.

BY

CHRISTOPHER STUART PATERSON,
LL.D.

OF THE PHILADELPHIA BAR.

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1886

TO

MY FRIEND, AND MY PRECEPTOR

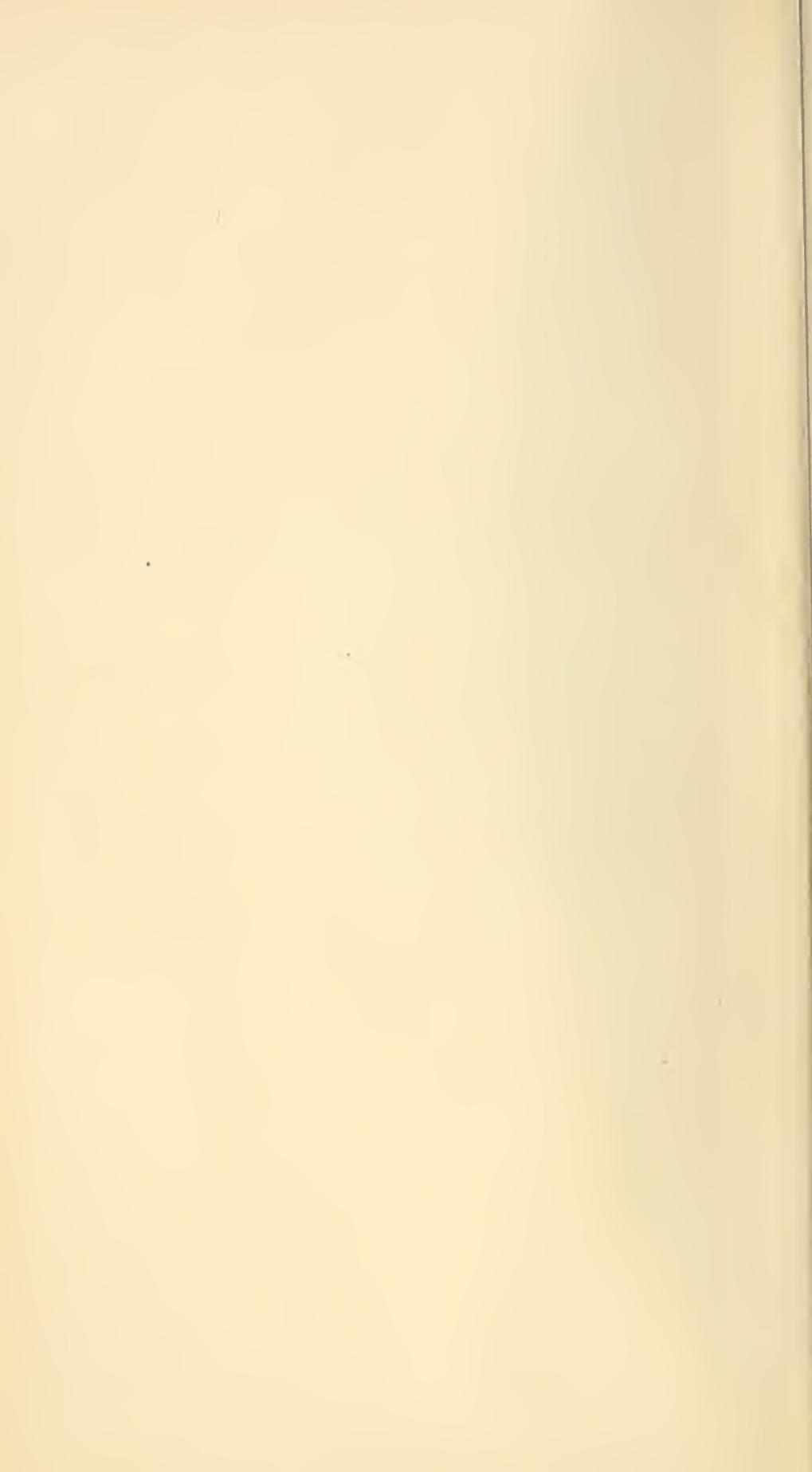
IN THE LAW,

THE HONOURABLE WILLIAM A. PORTER,

I GRATEFULLY DEDICATE THIS BOOK.

I leave these words of dedication, as they were written when the preparation of this work was begun, although he, whose name honours this page, has, since then, in the fullness of years, in the maturity of his powers, and to the sorrow of all who knew him, passed away from earth.

CHRISTOPHER STUART PATTERSON.



PREFACE.

My object in writing this book has been that of providing in a compact form a treatise, which should be of practical use to judges and to counsel in the trial of actions against railways for injuries to the person, not only by furnishing references to the leading, and to the more recent, cases, but also by stating clearly the general principles, whose application must determine cases for which exact precedents are not to be found.

I am as conscious, as any of my readers can be, of the many imperfections of my work, but I submit it to the indulgent judgment of my professional brethren in the hope that they will appreciate the labour and the pains that have been devoted to its preparation.

C. S. P.

PHILADELPHIA, October, 1836.

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BOOK I.

THE GENERAL NATURE OF THE RAILWAY'S LIABILITY

CHAPTER I.

NEGLIGENCE.

- I. Negligence the test of liability.
- II. The liability as affected by the quasi public character of railways.
- III. Negligence defined.
- IV. Distinctions in degrees of negligence.
- V. Proximate and remote cause.
- VI. The liability for injuries caused by an act of God.
- VII. The liability for injuries caused by an act of the public enemy.
- VIII. The liability for injuries caused by inevitable accident.
- IX. The liability for injuries caused solely by the act of the injured person.
- X. The liability for omissions and acts of commission by agents and servants.
- XI. The liability for the negligent acts of those who are not agents or servants.
- XII. The non-performance of a duty imposed by statutes or municipal ordinances.
- XIII. Ultra vires.

I. NEGLIGENCE THE TEST OF LIABILITY.

Negligence upon the part of the railway is the test of its liability.

1. It is obvious that the relation between the railway and any person who may happen to be injured in the course of that railway's operations must be either contractual, or non-contractual. Of course, if there be a legally enforceable contract between the railway and an individual, the terms of that contract must, so far as they extend, determine the liability of the railway for

personal injuries to that individual. But the contract, although full and complete in other respects, may not contain any express stipulation as to the nature and extent of that liability, or, if there be such a stipulation, it may be of such a character that it is against the policy of the law to recognize and enforce it. In either of these contingencies the liability of the railway must be rested upon the implied contract between the parties, or, in other words, upon the duty raised by the law and founded upon the relation of the parties. There may also be, where there is a contractual relation between the railway and the injured person, in addition to the obligation created by the contract, a duty raised by the law. If the relation between the railway and the injured person be not founded upon contract, the liability of the railway must solely depend upon the nature and extent of the duty imposed by law.

2. In section 140 the persons who may possibly be injured in the course of railway operations are classified, and it is shown that the liability of the railway to the individuals of each class is primarily dependent upon the fact of the railway's negligence, yet, as will be shown in other chapters of this book, that duty upon the part of the railway, whose non-performance is the essential element of its negligence, is not fixed and unvarying, but is dependent on the relation between the individual injured and the railway, and may be affected by the mental or physical incapacity of that individual, and in some cases, also, by the circumstances under which the injury is inflicted. Thus the railway does not owe a like duty to its passengers, to its servants, to persons who are rightfully upon public highways which adjoin or cross its line, to persons who come upon its line or premises as mere licensees, and to persons who trespass upon its line or premises; nor

does the railway in all cases owe a like duty to adults and to infants, nor to persons of average physical and mental capacity, and to those who are of less than average capacity, and whose incapacity has been made known to the railway's agents or servants. So, also, whatever be the relation which a person may hold to the railway, the railway may temporarily owe to him a higher degree of duty if its agents or servants have, in the exercise of their delegated authority, either by words or by acts, led him to rely on the performance by the railway of that higher degree of duty. For the purposes of this introductory chapter, it is enough to say that the general duty of the railway to all who are brought into contact with the operation of its line requires it in the original construction and subsequent maintenance in repair of its station approaches, buildings, and platforms, and of the embankments, bridges, cuttings, tunnels, levels, road-bed, rails, and switches which constitute its line, and of the engines and cars which it employs in the conduct of its business, to use good and sufficient material, to engage skilled engineers and contractors, and to follow correct methods of construction; from time to time to adopt and put into operation such appliances and methods of operation as, having been tested and found to materially contribute to the safety of railway operations, are in practical use, and can, in fact, be adopted by the railway; to test its machinery and appliances before they are put into use; from time to time to inspect its line, buildings, machinery, and appliances in order to guard against deterioration by wear and tear and by lapse of time; to make and enforce reasonable rules and regulations for the safety of all persons who shall be brought into contact with the operations of its line; to employ a sufficient number of servants; to select those servants

carefully; to make and enforce regulations for their guidance; and to use in the operation of its line every reasonable precaution for the safe conduct of its business; and a failure of duty in any one of these respects will render the railway liable for such injuries as might have been avoided by the performance of the particular duty.

II. THE LIABILITY AS AFFECTED BY THE QUASI PUBLIC CHARACTER OF RAILWAYS.

The liability of railways for the results of their negligence is neither increased nor diminished by their quasi public character.

3. While it is true that railway corporations, although created by the investment of private, and not public, capital, are, as grantees of public franchises, subject to governmental regulation and control, so far as they are not protected by the terms of their charters,¹ yet, inasmuch as they are primarily organized for purposes of private gain, they are private corporations,² and their obligation to indemnify those whom they may injure by the exercise of their franchises is neither increased nor diminished by their quasi public character. It is true that Bradley, J., has said³ that "the business of the common carrier in this country, at least, is emphatically a branch of the public service, and the conditions on which that public service shall be performed by private enterprise are not yet definitely settled;" but the suggestion therein conveyed of a future ascertainment of

¹ *Munn v. Illinois*, 94 U. S. 130; *C. B. & Q. R. R. v. Iowa*, Id. 161; *G. T. Ry. v. Stevens*, 95 Id. 655; *Barton v. Barbour*, 104 Id. 135; *Miltenberger v. Logansport Ry.*, 106 Id. 312; *Foster v. Fowler*, 60 Penna. St. 27.

² *Timlow v. P. & R. R. R.*, 99 Penna. St. 284; *P. & L. E. R. R. v. Bruce*, 102 Id. 23; *Pierce v. The Commonwealth*, 14 Weekly Notes of Cases 97; *Presbyterian Society v. A. & R. R. R.*, 3 Hill 567

³ *G. T. Ry. v. Stevens*, 95 U. S. 660.

the essential conditions of contracts of carriage by railway must, in the light of precedent and principle, be construed as an intimation of prospective legislation rather than as an authoritative declaration of existing law, or even as a foreshadowing of a judicial development of old principles in new directions, for when a railway has been chartered to construct a line and thereon to transport passengers and goods for hire, its franchise is the capacity thereby conferred of transacting the business of a common carrier subject only to such limitations as its charter prescribes, and to such regulations as the State may, in the exercise of its police power, lawfully impose upon individuals doing the like business. Thus much was conceded by Waite, C. J.,¹ when he said: "This company, in the transaction of its business, has the same rights, and is subject to the same control as private individuals under the same circumstances." Nevertheless, it must be borne in mind that in certain jurisdictions the law, from considerations of public policy, denies to railways the privilege of contracting for exemption from the results of their negligence.

III. NEGLIGENCE DEFINED.

Actionable negligence is a non-performance of duty causing injury to the person to whom the duty is owing.

4. The word "negligence" is so defined by lexicographers as to convey only the idea of a careless or thoughtless omission to act, but that negligence which is the subject of an action at law includes acts of commission and of omission, and comprehends equally that heedlessness which does not consider the possible results of an act, that rashness which cares not whether or not

¹ C. B. & Q. R. R. v. Iowa, 94 U. S. 161.

wrong be done by an act, and that wilful malice which intends the doing of wrong, and the distinction between a careless non-performance of duty and the wilful doing of wrong, in the characterization of any particular act, when done by an agent or servant of the railway is only material in determining the responsibility of the railway therefor.

5. Alderson, B.,¹ has defined negligence as "the omission to do something which a reasonable man, guided by those principles which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Paxson, J.,² has with greater brevity defined negligence as "the absence of care according to the circumstances," and Willes, J.,³ has pertinently said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use."⁴

6. Yet it cannot be said that any one of these definitions is perfectly satisfactory, for they all fail to adequately express the three essential elements of actionable negligence, that is, first, the existence of a duty owing by the defendant to the plaintiff or to the person whom that plaintiff represents; second, a non-performance of that duty by an act of commission or omission on the part of the defendant; and third, an injury to the

¹ *Blyth v. Birmingham Water Works Co.*, 11 Ex. 781.

² *P. W. & B. R. R. v. Stinger*, 78 Penna. St. 225.

³ *Grill v. Iron Screw Collier Co.*, L. R. 1 C. P. 612.

⁴ Similar definitions are given in *Bridges v. N. L. Ry.*, L. R. 7 H. L. 232; *Smith v. L. & S. W. Ry.*, L. R. 5 C. P. 102; *Johnson v. W. C. & P. R. R.*, 70 Penna. St. 366; *Kay v. P. R. R.*, 65 Id. 273; *Turnpike Co. v. P. & T. R. R.*, 54 Id. 351; *Fritsch v. Allegheny*, 91 Id. 226; *Jamison v. S. J. & S. C. R. R.*, 55 Cal. 593, 3 Am. & Eng. R. R. Cas. 350; *B. & P. R. R. v. Jones*, 95 U. S. 439; *Washington v. B. & O. R. R.*, 17 W. Va. 190, 10 Am. & Eng. R. R. Cas. 749.

plaintiff or the person whom he represents directly resulting from the defendant's non-performance of that duty. There must be both the existence of the duty and the breach of that duty, for otherwise the defendant has done no wrong, for as Erle, C. J., said¹ there can be no satisfactory proof of negligence as against a defendant, "unless it be shown that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty." So far as regards the right of action, it is immaterial whether the non-performance of duty upon the part of the defendant has been wilful or careless, but the form of the remedy and the *quantum* of damages may be materially affected by the wilful or careless character of the defendant's act, and where the injury is done by the act of a servant, the careless or willful character of the act may be material in determining the responsibility of the master. There must be actual injury, for otherwise the plaintiff has suffered only *damnum absque injuria*.

7. Brett, M. R.,² defines actionable negligence as "the neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." Of all the judicial definitions of negligence, this seems to me to be the most complete, but I venture to suggest that actionable negligence may be defined, with sufficient accuracy for all practical purposes, to be a non-performance of duty causing injury to the person to whom the duty is owing.

¹ Cotton v. Wood, 8 C. B. N. S. 568, 98 E. C. L.

² Heaven v. Pender, 11 Q. B. D. 507.

IV. DISTINCTIONS IN DEGREES OF NEGLIGENCE.

Distinctions in degrees of negligence are now generally regarded as unimportant.

8. The earlier cases,¹ following the civil law, attempted to classify negligence under the three categories of "slight," "ordinary," and "gross," but, bearing in mind the definitions quoted in the preceding paragraph, distinctions between the degrees of negligence become of little or of no importance, for the want of that care which the circumstances of the particular case make necessary is the foundation of a legal liability, whether it be in itself slight, ordinary, or gross negligence. This view has been sanctioned by high authority. Lord Denman² has said: "it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." Lord Cranworth³ has said that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." In the Supreme Court of the United States, Curtis, J.,⁴ has characterized as impracticable any distinction between degrees of negligence; and Davis, J.,⁵ has said: "gross negligence is a relative term; after all, it means the absence of care that was necessary under the circumstances." The same view has been taken in other cases.⁶

9. But Bradley, J.,⁷ has said: "in each case the

¹ Duff *v.* Budd, 3 Brod. & B. 177, 7 E. C. L.; Wyld *v.* Pickford, 8 M. & W. 443; Owen *v.* Burnett, 4 Tyr. 133; Smith *v.* Horne, 8 Taunt. 144, 4 E. C. L.; Tracy *v.* Wood, 3 Mason 132; Foster *v.* Essex Bank, 17 Mass. 479.

² Hinton *v.* Dibbin, 2 Ad. & El. N. S. 661, 42 E. C. L.

³ Wilson *v.* Brett, 11 M. & W. 115.

⁴ Steamboat New World *v.* King, 16 How. 469.

⁵ M. & St. P. Ry. *v.* Arms, 91 U. S. 495.

⁶ Beal *v.* S. D. Ry., 3 H. & C. 341; Grill *v.* Iron Serew Collier Co., L. R. 1 C. P. 612; Briggs *v.* Taylor, 28 Vt. 180; Perkins *v.* N. Y. C. R. R., 24 N. Y. 196.

⁷ N. Y. C. R. R. *v.* Lockwood, 17 Wall. 357.

negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply ‘negligence.’ And this seems to be the tendency of modern authorities. If they mean more than this and seek to abolish the distinctions of degrees of care, skill, and diligence required in the performance of various duties, and the fulfillment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed.”

V. PROXIMATE AND REMOTE CAUSE.

The negligence of the railway must be the proximate, and not the remote cause of the injury to the plaintiff.

10. It is, however, not sufficient to define negligence in abstract terms. It is necessary, also, to discriminate between those causes of injury to individuals which do, and those which do not, result from negligence on the part of the railway, and to illustrate the distinction by reference to adjudged cases.

11. The negligence of the railway must have been the efficient cause of the injury, for as Gibson, C. J.,¹ has said, the defendant “is answerable for the consequences of negligence, and not for its abstract existence,” and as Cairns, L. C.,² has said, “the negligence must in some way connect itself, or be connected by evidence, with the accident. It must be * * * *incuria dans locum injuriae.*” If its negligence be the efficient cause of the injury, the railway must, as Nares, J.,³

¹ Hart *v.* Allen, 2 Watts 116.

² M. Ry. *v.* Jackson, L. R. 3 App. Cas. 198.

³ Scott *v.* Shepherd, 2 Bl. 892.

said, with regard to the original thrower of that squib which has played so important a part in the history of the law, be “answerable for all the consequences” of its negligence; but those consequences in a legal sense are the proximate and not the remote consequences, for as Lord Bacon¹ said, in explanation of the maxim “*causa proxima non remota spectatur*,” “it were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree.”

12. Of course, the soundness of the rule as thus stated is generally conceded, but there is often great practical difficulty in its application to the facts of particular cases. It would, therefore, be desirable to obtain, if it were possible, a test by which to determine whether or not any specific act of negligence be the proximate cause of the injury in any particular case.

13. Different tests have been suggested. In one class of cases the suggested test is the existence of an unbroken connection between the wrongful act or omission and the injury. The theory of this test is thus explained by Strong, J.,² “we do not say that even the natural and probable consequences of a wrongful act or omission are, in all cases, to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be, whether there was any intermediate cause disconnected from the primary fault and

¹ Max. Reg. 1.

² M. & St. P. Ry. v. Kellogg, 94 U. S. 469, 475.

self-operating which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."¹

14. Another suggested test is that the injury should be such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to follow from his act. Bovill, C. J.,² states it thus: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage, which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the dam-

¹ Substantially the same view is taken in *Ins. Co. v. Tweed*, 7 Wall. 44; *Scheffer v. W. C. V. M. & G. S. R. R.*, 105 U. S. 249; *Ins. Co. v. Seaver*, 19 Wall. 531; *Fawcett v. P. C. & St. L. Ry.* 24 W. Va. 755.

² *Sharp v. Powell*, L. R., 7 C. P. 253.

age probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." In the same case Grove, J., said : "The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would, perhaps, be a better expression," and Keating, J., based his judgment for the defendant on the fact that the damage in question was not "one which the defendant could fairly be expected to anticipate as likely to ensue from his act."

15. The same view was obviously present to the mind of Bramwell, B.,¹ when he said, "it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure that it was not discovered until many months after the accident had happened."

Paxson, J.,² states the same view clearly and forcibly, thus, "a man's responsibility for his negligence, and that of his servants, must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle * * * that, in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim *causa*

¹ *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 785.

² *Hoag v. L. S. & M. S. R. R.*, 85 Penna. St. 293.

proxima non remota spectatur: it only affects its application.”¹

16. But, as is pointed out in the judgments in *Smith v. L. & S. W. Ry.*,² it must be borne in mind in applying the last suggested test that a defendant, who does a negligent act, ought to be held responsible for any natural consequences of that act, although the particular consequence which resulted from the act either was not or could not have been anticipated by him. Neither of the suggested tests is so precise and definite that its application to the facts of any possible case will, at once and beyond doubt, determine the liability of the railway to the plaintiff, and in the end the correct solution of the problem in any case is dependent upon the exercise of a sound judgment by the judge and the jury; for, it is for the jury, as Paxson, J.,³ has said, “to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen, and necessary result of such cause.”⁴ But it is for the court in this, as in all other cases which go to the jury, to determine in the first instance whether, assuming the truth of the evidence, the jury can reasonably find a verdict for the party upon whom, under the pleadings, the burden of proof rests.⁵

¹ The last-mentioned test is adopted as the correct one in *Greenland v. Chaplin*, 5 Ex. 243; *Hoag v. L. S. & M. S. R. R.*, 85 Penna. St. 293; *P. S. Ry. v. Taylor*, 104 Id. 306; *Hunter v. Wanamaker*, 17 Weekly Notes of Cases (Penna.) 232, 1 Penna. Sup. Ct. Digest 7.

² *L. R.*, 6 C. P. 14.

³ *Hoag v. L. S. & M. S. R. R.*, 85 Penna. St. 294.

⁴ *Webb v. R. W. & O. R. R.*, 49 N. Y. 420; *P. R. R. v. Hope*, 80 Penna. St. 373; *P. & N. Y. C. R. R. v. Lacey*, 89 Id. 458; *M. & S. P. Ry. v. Kellogg*, 94 U. S. 469; *L. E. R. R. v. McKeen*, 90 Penna. St. 122; *P. W. & B. R. R. v. Brannen*, 17 Weekly Notes of Cases (Penna.) 227; *Billman v. I. C. & L. R. R.*, 76 Ind. 166; 6 Am. & Eng. R. R. Cas. 41.

⁵ *Hoag v. L. S. & M. S. R. R.*, 85 Penna. St. 294.

17. Where injuries are inflicted, in the course of railway operations, upon the person of one who is himself without fault, those injuries are generally so immediate and all their effects so obviously connected, that there is no reason to doubt that the damage is the proximate result of some particular act or omission on the part of the railway, but when the question of proximate or remote cause is raised, it turns either on the relation of the injuries, whatever they may be, to the particular act or omission on the part of the railway, or on the connection between some subsequently developed injury to the plaintiff and his original injury.

18. As illustrations of the first class there are the cases of injuries suffered by one in attempting to escape from a situation of apparent peril to life or limb in which he has been placed by negligence on the part of the railway, and the cases of injuries incurred in attempting to obviate some more or less serious inconvenience, which the railway's negligence or breach of contract has brought upon one. As illustrations of the second class, there are the cases of disabilities or maladies supervening upon the immediately apparent injuries inflicted by the railway's negligence.

The railway is liable for injuries suffered by one in attempting to escape from a situation of apparent peril to life or limb, in which he has been placed by the negligence of the railway.

19. The leading case is *Jones v. Boyce*,¹ where the plaintiff was a passenger by the defendant's coach; a rein having broken, and one of the leaders becoming ungovernable, whilst the coach was passing a hill, the plaintiff, apprehending the overturning of the coach, which, however, was not overturned, jumped off, and in

¹ 1 Starkie 493, 2 E. C. L.

so doing broke his leg, whereas if he had remained on the coach he would not have been injured. Lord Ellenborough directed the jury that "to enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. If that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is whether he was placed in such a situation as to render what he did a prudent precaution for the purpose of self-preservation."¹

The railway is liable for injuries incurred by one in attempting, by an act not obviously dangerous, to obviate a serious inconvenience to him caused by the negligence of the railway.

20. Thus, in *Adams v. L. & Y. Ry.*,² the door of the carriage in which the plaintiff was riding would not remain shut while the train was in motion, but there was room enough for the plaintiff to sit away from the door, and the weather was good. The plaintiff, having

¹ See also *Stokes v. Saltonstall*, 13 Pet. 181; *N. & C. R. R. v. Erwin* (Tenn.), 3 Am. & Eng. R. R. Cas. 465; *Caswell v. B. & W. R. R.*, 98 Mass. 194; *E. T. V. & G. R. R. v. Gurley*, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. R. Cas. 568; *G. R. R. v. Rhodes*, 56 Ga. 645; *C. R. R. v. Roach*, 64 Id. 635, 8 Am. & Eng. R. R. Cas. 79; *P. B. & W. R. R. v. Rohrman*, 13 Weekly Notes of Cases 253; 12 Am. & Eng. R. R. Cas. 176; *Smith v. St. P. M. & M. Ry.*, 30 Minn. 169, 9 Am. & Eng. R. R. Cas. 262; *Iron R. R. v. Mowery*, 36 Ohio St. 418, 3 Am. & Eng. R. R. Cas. 361; *Buel v. N. Y. C. R. R.*, 31 N. Y. 314; *S. W. R. R. v. Paulk*, 24 Ga. 356; *Wilson v. N. P. R. R.*, 26 Minn. 278; *M. & W. R. R. v. Winn*, 26 Ga. 250.

² L. R. 4 C. P. 739.

shut the door three times, attempted for the fourth time to close it within three minutes of the time of arrival of the train at a station, and, in so doing, he fell out and was injured. Judgment was entered for the defendant upon the ground that, as the inconvenience to the plaintiff from the open door was slight, and the peril in attempting to close it was considerable, the injury resulting from that attempt was caused solely by his own carelessness.¹ On the other hand, in *W. M. R. R. v. Stanley*,² a passenger was held entitled to recover for injuries received in attempting to close the door of his car while passing through a tunnel, the railway having omitted to light the car, and the open door inconveniencing the plaintiff and the other passengers in the car by its admission of smoke and cinders. In cases such as these, probably the true ground of decision is that the plaintiff cannot recover if in attempting to avoid that which is merely inconvenient, and in no sense dangerous, he encounters a danger obviously apparent to the minds of reasonable men; but, on the other hand, as Brett, J.,³ said, "if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness," the railway "would be liable for any injury that might result from an attempt to avoid such inconvenience."

¹ In the later case of *Gee v. M. Ry.*, L. R. 8 Q. B. 161, *Adams v. L. & Y. Ry.* is commented on, and the application to the facts of that case of the doctrine as above stated, questioned.

² 61 Md. 266, 18 Am. & Eng. R. R. Cas. 206.

³ *Adams v. L. & Y. Ry.*, L. R. 4 C. P. 744.

The railway ought not to be held liable in damages for injuries which result not from its negligence, but solely from the attempt of the injured person to obviate by his own rash act an inconvenience caused to him by the railway's breach of contract.

21. There are also other cases which, though in reality very different from those referred to in section 19, are generally decided upon the same principle, and those are the cases of passengers who, when the railway does not bring its train to a stop at a station, or does not stop the train for a sufficient length of time to enable them to enter or alight from the train in safety, attempt to get on or off the train while it is in motion, and are thereby injured. Many of the authorities hold that the rule of decision in such cases is that the railway is to be held liable for injuries thus caused, unless the jury shall find that the person injured in getting on or off the cars encountered a danger obviously apparent to the minds of reasonable men. Other authorities hold that such injuries are self inflicted, and that the railway is not to be held liable therefor. The principle involved in these cases was ruled in *Clayards v. Dethick*,¹ where the defendant had dug a dangerous trench in the only outlet from a mews, and the plaintiff's horse in coming out of the mews fell into the ditch and was killed. Denman, C. J., directed the jury "that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendant had made the passage in some degree dangerous, * * * though, if the plaintiff had persisted in running upon a great and obvious danger his action could not be maintained." A verdict having passed for the plaintiff, a rule for a new trial was discharged. *Clayards v. Dethick* is cited with approval and followed in *Thompson v. N. E. Ry.*,²

¹ 12 Q. B. 439; 64 E. C. L.

² 2 B. & S. 106; 110 E. C. L.

where the defendants as proprietors of a dock and tidal basin, which they had opened for use before its construction had been completed by dredging it throughout to the required depth, were held liable in damages to the owner of a ship which had grounded in leaving the dock, although the pilot knew that the channel of requisite depth was narrow, for the verdict of the jury having negatived negligence on the part of the plaintiff, the plaintiff's recovery was not to be prevented without proof that the state of the basin was such as to render it imprudent to attempt to take the vessel out. In *Siner v. G. W. Ry.*,¹ where it was held that the railway was not liable to a female passenger who was injured in descending from a railway carriage, because she chose to jump down rather than to avail herself of the steps of the carriage, Kelly, C. B., said, in his dissenting judgment,² "I am clearly of opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose, namely, either to go on to Bangor or to take his chance of danger and jump out; and if they do so the choice is made at their peril."³

22. On the other hand, in *Lax v. Darlington*,⁴ Bramwell, L. J., said: "A person traveling on a railway is taken to some place where he ought not to have been taken—beyond a platform, for instance. He jumps out, risking the danger, and hurts himself. In my opinion in such a case as that he ought to have no remedy against the company for the hurt; if he chooses to jump out and hurt himself, he

¹ L. R. 3 Ex. 150; 4 Id. 117.

² L. R. 3 Ex. 156.

³ Similar views are expressed in *Filer v. N. Y. C. R. R.*, 49 N. Y. 47; *P. R. R. v. Kilgore*, 32 Penna. St. 292; *Johnson v. W. C. & P. R. R.*, 70 Id. 357, and in many other cases.

⁴ 5 Ex. D. 35.

must take the hurt. What he must do is to sit in the carriage and be carried on beyond where he wants to go, and then bring his action against the company for not affording him proper accommodation to get out. I have no doubt of the good sense of that; I have not a misgiving of it, and I cannot agree to a great deal of what was said in the case of *Clayards v. Dethick*.¹ It was there asked, ‘was the cabman bound to stay in all day?’ Bound! Bound to whom? A person being bound supposes his being bound to somebody. It is an inaccurate expression. One does not care about words except when they mislead. The expression ‘bound’ was used there. Why, of course, he was not bound, because there was nobody to say to him, ‘you shall.’ But if he chooses to go out with an obvious danger before him he must take the consequences. Suppose a man is shut up in the top room of a house unlawfully, is he bound to stay there? He is not bound to do anything of the kind; he may jump out if he likes to run the risk of breaking his neck or his limbs; he may let himself down by a rope or a ladder, but if he runs the risk of getting out and breaks his neck, the person who shuts him up is not guilty of manslaughter; and if he breaks his leg he ought not to have any right of action against that person, although he was not bound to stay there. Then there was another expression used which I cannot help thinking was an unfortunate one. It was this: ‘What would a prudent man do?’ Just see the consequence of that sort of reasoning. A prudent cabman with a good horse having a shilling fare offered to him would have stopped at home; a prudent cabman with a bad horse and a pound fare would have chanced it. The consequences would be that he could recover if he hurt a bad horse,

¹ 12 Q. B. 439; 64 E. C. L.

but could not recover if he hurt a good one. The truth is, to talk of what a prudent man would do is a misleading way of considering the matter. A prudent man would lead a forlorn hope under some circumstances, because the possible gain, in his estimation, would be equal to the risk. It is not, therefore, a question of prudence. I dare say a prudent man might jump out of a train going very fast, if he saw some imminent danger to his wife or child, or anybody for whom he had great affection, and he could immediately go and rescue them. It is not, therefore, a question of prudence as far as he is concerned. I think that case—I should not have discussed it at the length I have done if an erroneous idea was not conveyed by it—can only be justified on a ground which, I think, will be found, especially in the judgment of Wightman, J., and upon which I am inclined to think some of the judges really decided it. It is this: That the danger there was not an obvious one; that when the cabman went out he got into trouble from what, in truth, was a pitfall, the nature of which he was unaware of, but which had been prepared for him by the defendant. Upon that ground, perhaps, the judgment may be supported; but I have a misgiving, even then, whether, when there was a danger of accident, it was not his—I will not say his duty—but whether it was not for him to ascertain the extent of it before he ran the risk of it. However, I think it is upon that ground only that the case can be sustained. It is said that it has been afterward cited and adopted in *Wyatt v. G. W. Ry.*¹ It was no doubt cited and adopted, but I am very much inclined to think it was adopted upon the principle that I have mentioned, and that may be seen especially from the judgment of the majority of the court. If *Clayards v.*

¹ 6 B. & S. 709; 118 E. C. L.; 34 L. J. (Q. B.) 204.

Dethick and Wyatt *v.* Great Western Ry. Co. are adopted to their full extent, I am constrained to express my distrust of those cases."

23. The result reached in Wyatt *v.* G. W. Ry.¹ is inconsistent with the doctrine of Clayards *v.* Dethick, for it was there held that a person who while traveling on a highway had been injured in opening for himself, the railway servants being absent, a statutory gate which a railway had erected at a local crossing, and which, when closed, barred the highway, could not recover. Bramwell, B., said forcibly in Siner *v.* G. W. Ry.,² "suppose the defendants had covenanted with the plaintiff, under seal, to carry her to a particular place, and to provide proper means of exit from the carriage, and that the plaintiff, declaring upon the covenant, alleged a breach of contract, and then went on to say, *per quod*, I jumped from the carriage, and in so doing hurt myself, would that be *per quod*? Would it be damage legitimately flowing from the breach of contract? I think not. She could only say that her act was led or induced, not that it was caused, by their breach of contract. It could not be said that her jumping out was a legitimate consequence of their neglect, and it is none the more so because she sues in tort. The question has been argued as if it were one of contributory negligence; but it is not. The whole mischief resulted from the plaintiff's own act, and even assuming negligence in the defendants, that negligence was not the cause of the accident."

24. Unquestionably, the true ground of decision in cases of this class is that which is suggested by the *dicta* quoted from the judgment of Bramwell, J., in Siner's case. The obligation of a railway to take up or set down a passenger at a particular station is an obligation de-

¹ 6 B. & S. 709; 118 E. C. L.

² L. R. 3 Ex. 154.

pendent solely upon the contract between the particular passenger and the railway, and not an obligation arising out of the general duty of the railway to its passengers. When, therefore, the railway does not stop its train at the particular station at which it has contracted to receive or deliver the passenger, or when the railway does not stop its train at that station for a sufficient time to enable the passenger to enter or alight from its car, it thereby breaks its contract with the passenger, but it does not inflict upon him that sort of wrong which the law characterizes as a *tort*. Under such circumstances the passenger who, by the failure of the railway to stop its train, is carried past his station, or is left on the station platform, as the case may be, has his remedy by an action at law against the railway for the breach of its contract, and in that action he can recover the damages which naturally and necessarily result from that breach of contract, that is, compensation for any inconvenience to which the railway's breach of contract has put him. But if, not content with the remedy which the law gives him, or impelled by a natural desire to carry out his preconceived purpose, he jumps upon or from the train in motion, or does any other act which is the cause of injury to him, the railway ought not to be held liable, for that injury, however unfortunate and however serious, is the result not of the railway's failure to stop its train in accordance with its contract, but of his own rash act. Black, C. J., puts this very forcibly,¹ saying, "If a passenger be negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back; because these are the direct consequences

¹ P. R. R. v. Aspell, 23 Penn. St. 147.

of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself." If the views herein expressed be sound, those cases have been wrongly decided wherein it has been held that, under such circumstances, the plaintiff can recover.

25. Another class of cases in which the same result should be reached is that of adult persons, who, finding a railway crossing of a highway blocked by cars, attempt to pass under or climb over the cars, and in so doing are injured. In these cases there is, of course, no contractual relation between the person injured and the railway, but every such person has his remedy by action against the railway for his individual loss resulting from its obstruction of the highway, and any injuries which he may bring upon himself in his efforts to avoid the inconvenience caused by that obstruction are self inflicted, and are not justly chargeable to the railway. Of course, where, under such circumstances, the person injured, is by infancy or otherwise, incapacitated from realizing the danger of doing the act which causes the injury, a different principle applies, and the railway may justly be held liable for its negligence in leaving upon a highway that which may become a cause of injury to persons so incapacitated. The mistaken result which has been reached in so many of the cases of injuries incurred in getting on or off moving cars, or in climbing over or in passing under cars which obstruct a highway crossing, is largely due to the fact that those cases are, in general, considered to raise questions of contributory negligence, whereas they really raise the question of the relation between the plaintiff's injury and the railway's non-performance of its duty as the proximate or remote cause of that injury.

Illustrations of the general doctrine as to proximate and remote cause : cases in which the negligenee proven was held to be too remote.

26. In further illustration of the general doctrine as to proximate and remote cause, reference may be made to the following cases, in which the negligence proven was held to be too remote to be considered the efficient cause of the injury for which the plaintiff sought reparation. In *P. C. & St. L. Ry. v. Staley*,¹ the railway having unlawfully obstructed a highway crossing by a train at rest, the plaintiff, in order to avoid the obstruction, turned into another street, and there was injured by falling on the ice. In *P. S. Ry. v. Taylor*,² the railway had permitted a derailed and overturned car to remain at the side of a highway crossing, and the plaintiff's horse was frightened thereby. In *Jackson v. N. C. & St. L. Ry.*,³ the railway obstructed a highway crossing by a train, and the plaintiff, in avoiding the obstruction by driving across the line at a point where there was no public crossing, and, consequently, no planking between the rails, was jolted out of his vehicle, and thereby injured. In *M. Railway v. Jackson*,⁴ the carriage in which the passenger was riding being overcrowded, other persons attempted at a station to force their way into the carriage, and the plaintiff, having risen to prevent their entrance as the train started, in order to save himself from falling, put his hand on the edge of the door, where it was caught and crushed by the act of the railway's servant in closing the door, in the performance of his duty. In *Hobbs v. L. & S. W. Ry.*,⁵ the railway set down the plaintiff and his wife and children, at night and in a rain storm, at a

¹ 41 Ohio St. 118, 19 Am. & Eng. R. R. Cas. 381.

² 104 Penna. St. 306.

³ 13 Lea (Tenn.) 491, 19 Am. & Eng. R. R. Cas. 433.

⁴ 3 App. Cas. 193.

⁵ L. R. 10 Q. B. 111.

station several miles distant from that to which it had agreed to carry them, and the wife contracted a severe illness from walking in the storm.¹

27. In *Cornman v. E. C. Ry.*,² the plaintiff, while inquiring for a parcel at a station upon a holiday, was forced by a crowd of passengers against a weighing machine, the foot of which projected about six inches above the level of the platform, and was injured by falling over that machine. In *Hunter v. Stewart*,³ the plaintiff, an unmarried woman, was disfigured by the negligence of a carrier, and her possibility of successful marriage thereby diminished. In *Williamson v. G. T. Ry.*,⁴ the plaintiff was wrongfully expelled from a car, and in leaving it fell and was injured. In *Phyfe v. M. Ry.*,⁵ the plaintiff was so severely hurt as to be confined to his house for a time, and he alone being able to open the safe at his place of business, some gold which was stored therein could not be sold, and he thereby lost the profits on its sale. In *McClelland v. L. N. A. & C. Ry.*,⁶ the railway was held not to be liable in damages for the death of a drunken passenger, who, having been rightfully expelled from a train, subsequently wandered upon the line and was run over by another train, but without fault on the part of the servants in charge of

¹ See, also, in support of the rule in Hobbs' case: *Walsh v. C. M. & St. P. Ry.*, 42 Wisc. 23; *L. & N. R. R. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. R. Cas. 347; *Lewis v. F. & P. M. Ry.*, 54 Mich. 55, 18 Am. & Eng. R. R. Cas. 263; *Francis v. St. L. T. Co.*, 5 Mo. App. Cas. 7; *St. L., K. C. & N. R. R. v. Trigg*, 74 Mo. 147, 6 Am. & Eng. R. R. Cas. 345; *St. L., K. C. & N. R. R. v. Marshall*, 78 Mo. 610, 18 Am. & Eng. R. R. Cas. 248; *sed cf. Brown v. C. M. & St. P. Ry.*, 54 Wisc. 342, 3 Am. & Eng. R. R. Cas. 444; *C. H. & I. R. R. v. Eaton*, 94 Ind. 474, 18 Am. & Eng. R. R. Cas. 254; *L. E. & W. Ry. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. R. Cas. 109.

² 4 H. & N. 78. 181

³ 47 Me. 419.

⁴ 17 Up. Can. (C. P.) 615.

⁵ 30 Hun (N. Y.) 377.

⁶ 94 Ind. 276, 18 Am. & Eng. R. R. Cas. 260.

that train.¹ In *Henry v. St. L., K. C. & N. Ry.*,² a railway servant having directed a passenger to change from one car to another at a way station, and the passenger, having as directed gone to the other car, and having been informed by a railway servant that he would not be permitted to remain in that car because its train was not made up, alighted therefrom, and while standing on the line was injured by another train, and it was held that his expulsion from the car was not the proximate cause of his injury.

Illustrations of the general doctrine as to proximate and remote cause: cases in which the negligence proven was held to be the proximate cause of the injury.

28. In the following cases the negligence proven was held to be a sufficiently proximate cause of the injury to render the railway responsible therefor; in *P., W. & B. R. R. v. Brannen*,³ the negligent blowing of an engine whistle by an engine driver, thereby frightening a horse on a highway, who, in running away, ran over and injured the plaintiff while walking on the highway;⁴ the negligence of a railway in not maintaining its roadbed and rails in a condition for the safe movement of trains, whereby an engine was derailed, and the engine driver in reversing the lever broke his arm;⁵ the act of the railway's servant in mistakenly putting a female passenger off the train at a station three miles short of the station to which the railway had contracted to carry her, whereby she, being preg-

¹ See, also, *Haley v. C. & N. W. R. R.*, 21 Iowa 15; *Ry. v. Valleley*, 32 Ohio St. 345.

² 76 Mo. 288, 12 Am. & Eng. R. R. Cas. 136.

³ 17 Weekly Notes of Cases (Penns.) 227. See also *Lowery v. M. Ry.*, 99 N. Y. 158.

⁴ See, also, *Billman v. I. C. & L. R. R.*, 76 Ind. 166, 6 Am. & Eng. R. R. Cas. 41.

⁵ *Knapp v. S. C. & P. Ry.*, 65 Iowa 91, 18 Am. & Eng. R. R. Cas. 60.

nant and being unable to obtain means of conveyance, walked to her destination, and thereby brought on a miscarriage and subsequent illness.¹ So, where a passenger, having been ejected from a train in such manner that he was run over by that train, and subsequently by another train of the railway defendant, and death ensued, it was held that there was a cause of action vested in his personal representatives under the Georgia statute, whether the first or second train actually caused his death.² So, in *Eames v. T. & N. O. R. R.*,³ it was held that the failure of a railway to cut down on its right of way bushes which afforded cover to straying cattle was the proximate cause of injury to cattle who, suddenly emerging from such cover and going upon the line, were run over by a train before the servants in charge of it could bring it to a stop. So, in *Hayes v. M. C. R. R.*,⁴ where the railway was, by reason of its failure to perform a statutory duty of fencing its line on the borders of a public park, held liable for the injuries of a boy who had strayed upon the line and been run over by a train, Matthews, J., said: "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*—a cause which, if it had not existed, the injury would not have taken place—an occasional cause; and that is a question of fact,

¹ *Brown v. C. M. & St. P. Ry.*, 54 Wis. 342, 3 Am. & Eng. R. R. Cas. 444.

² *S. C. R. R. v. Nix*, 68 Ga. 572.

³ 63 Tex. 660, 22 Am. & Eng. R. R. Cas. 540.

⁴ 111 U. S. 228, 15 Am. & Eng. R. R. Cas. 394.

unless the casual connection is evidently not proximate."¹

The railway is liable for subsequently developed injuries that cannot be proved to have resulted from a sufficient and independent cause.

29. Where the question of proximate and remote cause turns on the connection between some subsequently developed personal injury to the plaintiff and the original injury, the rule deducible from the cases seems to be that the railway is responsible for every such subsequently developed injury that cannot be proven to have resulted from a sufficient independent cause; thus railways have been held liable for cancer following at an interval of three weeks after a blow on the breast of a female passenger;² for death by malarial fever following upon a fall into a creek at night;³ for the death of a child by pneumonia following upon the shock of a blow from an engine;⁴ for hernia following nine months after a scalding by an escape of steam from an engine;⁵ for the death of a person under a surgical operation which was made necessary by the original injury, and which, although performed by a competent surgeon, was unsuccessful;⁶ for a premature confinement and birth of a dead child re-

¹ See also *Williams v. G. W. Ry.*, L. R. 9 Ex. 157; *Maher v. W. & St. P. Ry.*, 31 Minn. 401, 13 Am. & Eng. R. R. Cas. 572; *Smith v. St. P., M. & M. Ry.*, 30 Minn. 169, 9 Am. & Eng. R. R. Cas. 262; *Hynes v. S. F. & N. P. R. R.*, 65 Cal. 316, 20 Am. & Eng. R. R. Cas. 486; *Schmidt v. M. & St. P. Ry.*, 23 Wis. 186: Cf. *Fitzgerald v. St. P., M. & M. Ry.*, 29 Minn. 336, 8 Am. & Eng. R. R. Cas. 310; *Knight v. N. Y., L. E. & W. R. R.*, 99 N. Y. 25.

² *B. C. P. Ry. v. Kemp*, 61 Md. 74, 18 Am. & Eng. R. R. Cas. 220.

³ *T. H. & J. Ry. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. R. Cas. 234.

⁴ *Jucker v. C. & N. W. R. R.*, 52 Wis. 150, 2 Am. & Eng. R. R. Cas. 41.

⁵ *Delie v. C. & N. W. R. R.*, 51 Wis. 400.

⁶ *Sauter v. N. Y. C. & H. R. R. R.*, 56 N. Y. 50.

sulting from fright caused to a pregnant female passenger by a collision.¹ So, in *Allison v. C. & N. W. Ry.*,² it was held that a passenger who had been injured by the fault of the railway, and thereafter, while being carried by the railway as a passenger, was again injured by its fault, could recover for the second injury and for its effects, although those effects were aggravated by the prior injury.³ On the other hand, the railway has been held not to be liable for the death of a passenger by suicide eight months after a collision in which he received blows on the head and spine;⁴ nor for the possibility of a second and future fracture of a leg by reason of the oblique character of a fracture which had been caused by the railway's negligence.⁵

VI. THE LIABILITY FOR INJURIES CAUSED BY AN ACT OF GOD.

A railway is not liable for injuries resulting from an "act of God," and without negligence on its part.

30. A railway is not liable for injuries caused by an "act of God," which, as defined by James, L. J., in *Nugent v. Smith*,⁶ is the result of the operation of "natural causes, directly and exclusively, without human intervention," and which "could not have been prevented by any amount of foresight and pains and care reasonably to be expected" of the railway. Thus in *Withers v. N. K. Ry.*,⁷ an embankment which had been standing for five years, in a country subject to floods, was

¹ *Fitzpatrick v. G. W. Ry.*, 12 Up. Can. (Q. B.) 645; *Beauchamp v. S. Mining Co.*, 50 Mich. 163; *Barbee v. Reese*, 60 Miss. 906.

² 42 Iowa 274.

³ See, also, *N. C. Ry. v. The State*, 29 Md. 420.

⁴ *Scheffler v. W. C. V. M. & G. S. R. R.*, 105 U. S. 249.

⁵ *Lincoln v. S. & S. R. R.*, 23 Wend. 425.

⁶ 1 C. P. D. 444.

⁷ 3 H. & N. 969.

undermined by an extraordinary flood. The train on which the plaintiff was a passenger, and which was running at express speed, ran off the line at night by reason of the sinking of the embankment, and the plaintiff was injured. After a verdict for the plaintiff, a rule for a new trial was made absolute, Pollock, C. B., saying: "The company were not bound to have constructed their embankment so as to meet such extraordinary floods." In *P. & R. R. v. Anderson*,¹ the accident was likewise caused by the fall of an embankment, but there was contradictory testimony with regard to the original construction of the embankment, engineering experts differing as to whether it had been so drained as to carry off the water. There was also proof that the train was drawn by an engine reversed, and that so running the engine at night and in a storm was negligence. Judgment upon a verdict for the plaintiff was affirmed in error upon the ground that upon the evidence thus stated the question was properly left to the jury. In *B. & O. R. R. v. S. S. Independent School District*,² the district sued to recover damages for the destruction of its school-house, which was carried away by a flood which a culvert under the railway embankment was not sufficiently large to pass. Judgment upon a verdict for the plaintiff was reversed in error, because the court below had instructed the jury in effect that negligence upon the part of the defendant concurring with the act of God, although that negligence did not produce the injury, and its absence would not have prevented it, was sufficient to render the defendant liable, Green, J., saying, "If the act of God in this particular case was of such an overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, produced the injury,

¹ 94 Penna. St. 351.

² 96 Penna. St. 65.

there would be no liability, although there were some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God and the concurring negligence to produce the injury." In *P., F. W. & C. Ry. v. Brigham*,¹ the plaintiff sued to recover for injuries caused by the fall of the roof of a station-house, which was blown down by a storm, the roof having stood for eighteen years, and the testimony being conflicting as to whether the roof had been properly constructed, and as to the usual or unusual character of the storm. Judgment upon a verdict for the plaintiff was reversed in error, because the judge at the trial instructed the jury "that the defendants were bound to provide against all storms which could reasonably have been expected, and by plain implication that the defendants were bound to provide against all storms that were not unprecedented, or were of a kind that had ever happened within the range of human experience," whereas the liability ought to have been made to turn upon the question of whether or not the defendants had used "that degree of care which a man of ordinary prudence is accustomed to employ in constructing or maintaining a building" for such a purpose. The general principle, thus stated, is supported by many authorities.²

31. Carefully constructed and operated railways are,

¹ 29 Ohio St. 374.

² *G. W. Ry. v. Braid*, 1 Moore P. C. N. S. 101; *Nichols v. Marsland*, 2 Ex. D. 1; *P., F. W. & C. Ry. v. Brigham*, 29 Ohio St. 374; *Lehigh Bridge v. L. C. & N. Co.*, 4 Rawle 9; *P. & R. R. v. Anderson*, 94 Penna. St. 351; *B. & O. R. R. v. School District*, 96 Id. 65, 2 Am. & Eng. R. R. Cas. 166; *Foster v. Juniata Bridge Co.*, 16 Penna. St. 393; *P., F. W. & C. Ry. v. Gilleland*, 56 Id. 445; *Livezey v. Philadelphia*, 64 Id. 106; *Welker v. N. C. R. R.*, 1 Weekly Notes of Cases (Penna.) 210; *Hayes v. Kennedy*, 41 Id. 378; *Morrison v. Davis*, 20 Id. 171; *Gould v. McKenna*, 86 Id. 297; *Nugent v. Smith*, 1 C. P. D. 423; *I. & G. N. R. R. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. R. Cas. 343; *M. & C. R. R. v. Reeves*, 10 Wall. 176; *Gates v. S. M. R. R.*, 23 Minn. 110, 2 Am. & Eng. R. R. Cas. 237; *Denny v. N. Y. C. R. R.*, 13 Gray 481.

therefore, not to be held liable for injuries resulting from the carrying away of their embankments or bridges by sudden and extraordinary floods;¹ nor from the prostration of their station buildings in an extraordinary gale;² nor when the train is blown from the track by a cyclone;³ nor when a train is derailed by the breaking of a rail by sudden frost.⁴ Under these authorities, the duty of the railway, as to its line and buildings, is adequately performed if they be so constructed as to resist the ordinary and probable action of the elements; but in *K. P. Ry. v. Miller*,⁵ a higher measure of responsibility was wrongly imposed, for it was there held that the railway is liable if it fail to provide against any extraordinary floods which may in the exercise of the highest degree of care be anticipated.

An extraordinary natural event does not, by occurring a second time, cease to be properly characterized as an "act of God."

32. To constitute an extraordinary natural event, in a legal sense, an "act of God," it is not necessary that such an event has never happened before, nor does such an event, by happening a second time, cease to be an "act of God;" thus in *P., F. W. & C. Ry. v. Gilleland*,⁶ the judge, at the trial, in his direction to the jury, having said: "Now, under these circumstances, it will be for you to determine whether the defendants ought or ought not after the first and second floods to alter their culvert

¹ *Withers v. N. K. Ry.*, 3 H. & N. 969; *G. W. Ry. v. Braid*, 1 Moore P. C. N. S. 101; *I. & G. N. R. R. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. R. Cas. 343; *Gates v. S. M. Ry.*, 28 Minn. 110, 2 Am. & Eng. R. R. Cas. 237; *H. & T. C. Ry. v. Fowler*, 56 Tex. 452, 8 Am. & Eng. R. R. Cas. 504; *O. & R. V. Ry. v. Brown*, 14 Neb. 170, 11 Am. & Eng. R. R. Cas. 501; *Ely v. St. L., K. C. & N. Ry.*, 77 Mo. 34, 16 Am. & Eng. R. R. Cas. 342.

² *P., F. W. & C. Ry. v. Brigham*, 29 Ohio St. 374.

³ *McClary v. I. C. Ry.*, 3 Neb. 44.

⁴ *McPadden v. N. Y. C. R. R.*, 44 N. Y. 478.

⁵ 2 Colo. 442.

⁶ 56 Penna. St. 445.

by enlarging its cavity. Considering the frequency of these floods, was it or was it not negligent in them not to do so after the repeated instances and positive notices, coupled with the request testified to," judgment was reversed; Agnew, J., in his opinion, said as to this instruction : "In effect this was to leave it to the jury to find a liability for extraordinary floods, because a second and a third happened like the first, and came in rapid succession. If all were extraordinary, as the instruction concedes, the surprise at the second and third could not be less than at the first, and it was still more surprising that they should come in this rapid succession. Being extraordinary, neither second nor third could have been expected more than the first. The rule as to extraordinary floods was therefore not changed. But the frequent recurrence of what was *supposed* to be extraordinary was some evidence that the real character of all these floods had been mistaken by those who testified as to their extraordinary character, and they were really only ordinary freshets, though measuring up to the highest altitude of that class. It was proper, therefore, to submit this question to the jury with instruction, if they so found the fact, to apply the rule as to ordinary freshets. But from the manner of submitting the instructions, doubtless the jury might understand that they were permitted to allow damages for these extraordinary floods because of their recurrence one after another in so short a time. In this there was error." Fry, J., expressed the same view in his judgment in N. P. & O. C. M. Co. v. L. & St. K. Docks Co.¹ saying : "I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence, when, in other words, it does not imply any law from which its recurrence can

¹ 9 Ch. D. 515.

be inferred—places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule, it is not, in my opinion, necessary that it should be unique; that it should happen for the first time. It is enough that it is extraordinary, and such as could not reasonably be anticipated."

Where negligence on the part of the railway has concurred with an "act of God" in causing the injury, the railway must be held liable therefor.

33. But, of course, where negligence on the part of a railway has concurred with the act of God in causing the injury, the railway will be held liable, as, for instance, where there has been negligence in the original construction of the line;¹ or, where the railway servants, being aware that a railway bridge had been carried away by a flood, do not take the proper steps to stop an approaching train;² or, where a storm of unusual severity having carried away a properly constructed embankment, the railway ran a train without causing the roadbed and track to be carefully examined in advance of the coming of the train.³

¹ P. & R. R. R. v. Anderson, 94 Penna. St. 356; Davis v. C. V. R. R., 55 Vt. 84, 11 Am. & Eng. R. R. Cas. 173.

² Lambkin v. S. E. Ry., 5 App. Cas. 352.

³ Ellet v. St. L., K. C. & N. Ry., 76 Mo. 518, 12 Am. & Eng. R. R. Cas. 183. See, also, as to the effect of negligence on the part of the railway concurring with an "act of God" in causing the injury: Dixon v. M. Board of Works, 7 Q. B. D. 418; Truitt v. H. & St. J. R. R., 62 Mo. 527; B. & O. R. R. v. School District, 96 Penna. St. 65, 2 Am. & Eng. R. R. Cas. 166; Straoss v. W., St. L. & P. Ry., 17 Fed. Rep. 209.

VII. THE LIABILITY FOR INJURIES CAUSED BY AN ACT OF THE PUBLIC ENEMY.

Railways are not liable for injuries resulting from an act of a public enemy.

34. Railways are not liable for injuries caused, without negligence on their part, by an act of the public enemy, as, where a railway bridge having been burned by an armed force in rebellion against the government of the United States, a train was, without negligence on the part of the railway, precipitated into the chasm.¹

VIII. THE LIABILITY FOR INJURIES CAUSED BY INEVITABLE ACCIDENT.

The railway is not liable for injuries caused, without negligence on its part, by inevitable accident.

35. Railways are not to be held liable for injuries resulting from inevitable accident, that is, accident not due in any way to negligence on the part of the railway, and such as no human foresight could avert. The distinction between an act of God and an inevitable accident is, that in the one case there is, and in the other case there is not, the presence and operation of *vis major*;² thus, the railway was held not to be liable for the death of a boy who climbed on a moving coal car, and, having dropped his hat, fell, in the effort to recover it, and was killed;³ nor where a child having hid himself in a ditch on the line was discovered by the

¹ Sawyer *v.* H. & St. J. R. R., 37 Mo. 240.

² Aston *v.* Heaven, 2 Esp. 533; Hammack *v.* White, 11 C. B. N. S. 588, 103 E. C. L.; Beach *v.* Parmeter, 23 Penna. St. 197; A. T. & S. F. R. R. *v.* Flinn, 24 Kans. 627, 1 Am. & Eng. R. R. Cas. 240; Hallihan *v.* St. J. R. R., 71 Mo. 113, 2 Am. & Eng. R. R. Cas. 117; Maschek *v.* St. L. R. R., 71 Mo. 276, 2 Am. & Eng. R. R. Cas. 38; H. M. & F. P. Ry. *v.* Kelley, 102 Penna. St. 115.

³ Woodbridge *v.* D. L. & W. R. R., 105 Penna. St. 460, 16 Weekly Notes of Cases (Penna.) 55.

engine driver too late to stop the train;¹ nor where boys, having, without the knowledge of the train men, climbed upon a moving freight car, were thrown off by a jolt in rounding a curve.² Upon the same principle the railway is held not to be liable to its passengers for injuries resulting from a hidden defect in its machinery or appliances, which, by the exercise of care upon its part, would not have been discovered.

IX. THE LIABILITY FOR INJURIES CAUSED SOLELY BY THE ACT OF THE INJURED PERSON.

The railway is not liable for injuries caused solely by the act of the injured person.

36. Railways are not liable for injuries solely caused by the act of the injured party, without negligence on the part of the railway; thus, in *Caswell v. Worth*,³ the plaintiff, a servant, having declared upon a breach by his master, the defendant, of a statutory duty to fence certain dangerous machinery, the defendant pleaded specially that the plaintiff wilfully and knowingly, and contrary to the express commands of the defendant, set the machinery in motion, and, on demurrer, judgment was entered for the defendant.⁴ So, where a railway, in obedience to a statute, had erected gates at a crossing but did not have any person in attendance to open and close them, and the plaintiff at night had opened the gates himself, and while he was driving through, the gates in swinging struck and frightened the plaintiff's horse, whereby the plaintiff was thrown out and injured, it was held that the railway

¹ *Meyer v. M. P. R. R.*, 2 Neb. 320.

² *State, etc., v. B. & O. R. R.*, 24 Md. 84.

³ 5 El. & Bl. 849, 85 E. C. L.

⁴ See, also, the cases put by Coleridge, J., in summing up in *Woolf v. Beard*, 8 C. & P. 373, 34 E. C. L.

was not liable.¹ Nor ought the motive, however praiseworthy, which induces the person injured to do the act which is demonstrably the sole cause of his injury, render the railway liable for that injury; thus, in *E. & C. R. R. v. Hiatt*,² it was held that a son, who in order to save his father's life, stepped upon the line in front of a moving train and was injured, could not recover from the railway. A contrary conclusion was reached in *Eckert v. L. I. Ry.*,³ where the plaintiff's decedent, standing near a railway line and seeing a child between the rails before a rapidly approaching train, rushed upon the line and threw the child off at the cost of his own life, and judgment upon a verdict for the plaintiff was affirmed in error by a divided court, Allen and Folger, JJ., dissenting. It is obvious that, in each of these cases, the question at issue was as to negligence on the part of the railway, and not as to contributory negligence on the part of the person injured, and that in neither case did the railway owe any duty to the person injured, and, for that reason, it could not be negligent as to him. The Indiana case was, therefore, rightly, and the New York case wrongly, decided.

X. THE LIABILITY FOR OMISSIONS AND ACTS OF COMMISSION BY AGENTS AND SERVANTS.

The railway is liable for an omission to perform its duty, by whomsoever that performance is omitted, and for negligent acts of commission, if the negligent act be done by its agent or servant.

37. Upon the principle stated by Blackburn, J.,⁴ where the injury is done by the omission of a particular act of care, which the duty of the railway to the person injured required it to do for his protection, the fact of

¹ *Wyatt v. G. W. Ry.*, 6 B. & S. 709, 118 E. C. L.

² 17 Ind. 102.

³ 43 N. Y. 502.

⁴ *The Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 115.

the omission fixes the liability of the railway, and the relation between the railway and the person who has omitted to perform the particular duty is immaterial, but where the injury is the result of misfeasance, the liability of the railway is necessarily dependent not only upon the character of the act done, but also upon the relation of express or implied agency between the railway and the wrongdoer, for, as Rolfe, B., said,¹ "the liability of any one other than the party actually guilty of a wrongful act proceeds on the maxim *qui facit per alium facit per se.*"

XI. THE LIABILITY FOR THE NEGLIGENT ACTS OF THOSE WHO ARE NOT AGENTS OR SERVANTS.

Railways are not liable for the negligent acts of persons who are not agents nor servants of the railway.

38. Railways are not to be held liable for injuries caused solely by the acts of persons who do not hold to the railway any relation of express or implied agency, as, for instance, where the injury results from the act of a stranger in placing obstruction on the line;² or, in turning a switch so as to derail a train;³ or, in putting on the track a fog signal, which, being exploded by the train, injured a passenger.⁴ Nor is the railway liable where injury to a passenger results from the falling upon a railway carriage of a bridge girder, which was being placed in position by a contractor engaged by another corporation, the railway having no reason to anticipate negligence on the part of the contractor;⁵

¹ *Reedie v. L. & N. W. Ry.*, 4 Ex. 243.

² *Curtis v. R. & S. R. R.*, 18 N. Y. 534; *Harris v. U. P. R. R.*, 13 Fed. Rep. 591, 4 McCrary 454.

³ *Latch v. R. Ry.*, 27 L. J. Exch. 155, 3 H. & N. 930 (American edition); *Keeley v. E. Ry.*, 47 How. Pr. 256.

⁴ *Jones v. G. T. Ry.*, 45 Up. Can. (Q. B.) 193.

⁵ *Daniel v. M. Ry.*, L. R. 3 C. P. 216, 591, 5 H. L. 45.

nor, for injuries resulting from negligence upon the part of another railway in the exercise of statutory running powers over the defendant's line;¹ nor, for injuries caused to a passenger by a mob of disorderly intruders who forced their way into the train and assaulted the passenger;² nor, in general, for the acts or omissions of independent contractors employed by the railway.

Negligence on the part of the railway is not excused by the concurrence of the negligence of a third party unconnected with either the railway or the injured person.

39. Where the plaintiff's injury can be traced to negligence on the part of the railway as its primary and proximate cause, the concurrence of the negligence of a person unconnected with either the railway or the person injured will not relieve the railway from responsibility for the consequences of its negligence. This general doctrine is asserted in many cases.³ One of the latest illustrations of this doctrine is to be found in the case of *Smith v. N. Y. S. & W. R. R.*,⁴ where a railway was held liable for injuries caused by collision resulting from the movement of certain cars which had been negligently left on a siding in such a situation that a

¹ *Taylor v. G. N. Ry.*, L. R. 1 C. P. 335; *Wright v. M. Ry.*, L. R. 8 Ex. 137.

² *P., F. W. & C. Ry. v. Hinds*, 53 Penna. St. 512.

³ *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892, 2 Sm. Lead. Cas. 797; *Dixon v. Bell*, 5 M. & S. 198; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L.; *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L.; *Daniels v. Potter*, 4 C. & P. 262, 19 E. C. L.; *Hughes v. Macfie*; *Abbott v. Macfie*, 2 H. & C. 744; *Bird v. Holbrook*, 4 Bing. 628, 15 E. C. L.; *Hill v. N. R. Co.*, 9 B. & S. 303; *Collins v. M. L. Commrs.*, L. R. 4 C. P. 279; *Harrison v. G. N. Ry.*, 3 H. & C. 231; *Sneesby v. L. & Y. Ry.*, 1 Q. B. D. 42; *Clark v. Chambers*, 3 Q. B. D. 327, disapproving *Mangan v. Atterton*, L. R. 1 Ex. 239; *Smith v. L. & S. W. Ry.*, L. R. 5 C. P. 98; *Pittsburgh v. Grier*, 22 Penna. St. 54; *Scott v. Hunter*, 46 Id. 192; *P. R. R. v. Hope*, 80 Id. 373; *O. C. Gas Co. v. Robinson*, 99 Id. 1; *Hey v. Philadelphia*, 2 Weekly Notes of Cases (Penna.) 466; *Raydure v. Knight*, Id. 713; *Fawcett v. P. C. & St. L. Ry.*, 24 W. Va. 755, 19 Am. & Eng. R. R. Cas. 1.

⁴ 46 N. J. L. 7, 18 Am. & Eng. R. R. Cas. 399.

wrongdoer could readily throw them on to the main line.¹ Nicholson *v.* E. R. R.,² which apparently contradicts the last-cited case, is, perhaps, distinguishable in that the person, whose injuries were the subject of the action in that case, was a mere licensee.

XII. THE NON-PERFORMANCE OF A DUTY IMPOSED BY STATUTES OR MUNICIPAL ORDINANCES.

Where the railway fails to perform a duty imposed by a statute, the railway is, by reason of such failure, liable for any injuries directly resulting therefrom, if the statute vests in the person injured a right of action for such non-performance of duty; but where the injuries do not directly result from such non-performance of duty, or where the statute does not, in terms, vest in the person injured a right of action, the railway is not to be held liable solely by reason of such non-performance.

40. The Stat. Westm. 2, 13 Edw. I, c. 50, gives an action on the case to any one aggrieved by the neglect of a statutory duty,³ but it does not necessarily follow that that which gives the right to sue is conclusive evidence of the fact upon which the right to recover must be based. In Couch *v.* Steel,⁴ a ship owner having neglected a statutory duty of keeping on board his ship a proper supply of medicines, it was held that a sailor

¹ See, also, L. & N. R. R. *v.* McKenna, 13 Lea (Tenn.) 280, 18 Am. & Eng. R. R. Cas. 276; Brown *v.* P. R. R., 8 Rob. (La.) 45.

² 41 N. Y. 525.

³ Comyn's Dig. Action on Stat. F.; Rowning *v.* Goodchild, 2 W. Bl. 906.

⁴ 3 E. & B. 402, 77 E. C. L.

NOTE.—All sidings on which cars are stored should be guarded, not only by the locking of the switch connecting with the main line, but also by the locking open of one rail, so as to divert from the main line a car if improperly moved on the siding. In the case of a double tracked line each siding should be so connected with a main line track that cars, in leaving the siding, should proceed in the same direction in which trains proceed on the main line track with which the siding is connected, and all siding switches should be safety switches, preserving the main line unbroken, equipped with targets by day and with lights by night, so arranged as to show automatically when the switch is open.

whose health had been injured for want of such medicines could maintain his action. In *Blamires v. L. & Y. Ry.*,¹ it was held that non-compliance with a statutory requirement of maintaining means of communication between passengers and guards, is, where injury has resulted to a passenger from the want of such means of communication, evidence of negligence. So in *Britton v. G. W. Cotton Co.*,² where the plaintiff, an employé, had been injured from the defendant's neglect of the statutory duty of fencing a fly wheel well, it was held that the plaintiff was entitled to recover. So also in *Stapley v. L. B. & S. C. Ry.*,³ the same rule was applied where the defendant had neglected its statutory duty of maintaining a servant in charge of the gates across a public carriage-way. In *Williams v. G. W. Ry.*,⁴ where the defendant's line crossed a public footpath, on the level, and the defendant had failed to perform its statutory duty of erecting gates, and the plaintiff was found upon the crossing with his foot severed, the defendant's non-fulfilment of its statutory obligation was held to be sufficient evidence of negligence to justify a verdict for the plaintiff. In *Hayes v. M. C. R. R.*,⁵ a municipality having under statutory authority made regulations for the fencing of railways within its limits, and the defendant having failed to comply with the regulations, and a boy having been injured for want of such fence, it was held that the defendant's neglect of its statutory duty was evidence of negligence. The same doctrine is asserted in *Nitro-Phosphate Co. v. L. S. & St. K. Co.*,⁶ where the plaintiff's loss was directly traceable to the defendant's failure to comply with the statutory regulation imposed by its charter with regard to the height

¹ L. R. 8 Ex. 283.

² L. R. 7 Ex. 130.

³ L. R. 1 Ex. 21.

⁴ L. R. 9 Ex. 157.

⁵ 111 U. S. 228.

⁶ L. R. 9 Ch. D. 503.

of its wall. On the other hand, in *Atkinson v. N. & G. Water Works Co.*,¹ where by statute the defendant was required to maintain fire-plugs with a sufficient supply of water, and plaintiff, whose property had been burned through defendant's default in not supplying a sufficient supply of water, brought his action against them, it was held on demurrer, by the Exchequer of Pleas, that the narr was good, but in the Court of Appeals this was reversed, upon the ground that the liability to private action for neglect of a statutory duty depends "on the purview of the legislature in the particular statute and the language which they have employed."² The rule deducible from the cases seems to be that which is stated in the heading of this section.

A non-performance of a duty imposed by a municipal ordinance does not per se constitute a ground of liability.

41. It is held in some cases that disobedience to a municipal ordinance is not a ground of liability.³ The contrary doctrine is asserted in other cases.⁴ It is held in other cases that the failure of a railway to perform a duty imposed by a municipal ordinance may be considered not as negligence, but merely as evidence of negligence.⁵

¹ L. R. 6 Ex. 404, 2 Ex. D. 441.

² See also *Gorris v. Scott*, L. R. 9 Exch. 125; *Fitzgerald v. St. P., M. & M. Ry.*, 29 Minn. 336, 8 Am. & Eng. R. R. Cas. 310; *Brown v. B. & S. L. R. R.* 22 N. Y. 191; *Thayer v. St. L. A. & T. H. R. R.*, 22 Ind. 26.

³ *P. & R. R. R. v. Ervin*, 89 Penna. St. 71; *P. & R. R. R. v. Boyer*, 97 Id. 91; *Heeney v. Sprague*, 11 R. I. 456; *Knupple v. K. I. Co.*, 84 N. Y. 491.

⁴ *Salisbury v. Herchenroder*, 106 Mass. 458; *Owings v. Jones*, 9 Md. 117; *B. C. P. R. R. v. McDonnell*, 43 Id. 552; *Bott v. Pratt*, 33 Minn. 323, 8 Am. & Eng. Corpor. Cas. 437.

⁵ *Kelley v. H. & St. J. R. R.*, 75 Mo. 138, 13 Am. & Eng. R. R. Cas. 638; *Meek v. Penna. Co.*, 38 Ohio St. 632, 13 Am. & Eng. R. R. Cas. 643; *Hanlon v. S. B. H. R. R.*, 129 Mass. 310, 2 Am. & Eng. R. R. Cas. 18.

XIII. ULTRA VIRES.

Where a railway has injured a person by its negligence, it is no defence to the railway that the injury was done in the course of its prosecution of a business which it had under its charter no power to carry on.

42. As Beasley, C. J., said in N. Y., L. E. & W. R. R. v. Haring,¹ "it would, indeed, be an anomalous result in legal science if a corporation should be permitted to set up that, inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. * * * All wrongs done by such bodies are, in a sense, *ultra vires*; and if the want of a franchise to do the tortious act be a defence, then corporations have a dispensation from liability for these acts peculiar to themselves." In that case the plaintiff having been injured on a street railway which was operated by the defendant, the court held that the railway's want of authorized corporate power to operate the street railway did not release it from legal responsibility for the negligent operation of that street railway. The doctrine of this case is supported by other authorities.² So in Bissell v. M. S. & N. J. R. R.,³ two railways, one of which had been chartered by the State of Michigan, and the other by the State of Indiana, and each of which had been authorized to construct a line within its own State and carry passengers thereon, having together engaged in the business of carrying passengers over a third line in another State, over which line their charter powers did not extend, and a passenger while being carried over

¹ 47 N. J. L. 137, 21 Am. & Eng. R. R. Cas. 436.

² Hutchinson v. W. & A. R. R., 53 Tenn. 634; Gruber v. W. & J. R. R., 92 N. C. 1, 21 Am. & Eng. R. R. Cas. 438.

³ 22 N. Y. 258.

that third line having been injured, it was held that the two railways were jointly liable to him.

43. On the other hand, in *Hood v. N. Y. & N. H. R. R.*,¹ the railway, not being authorized by its charter to carry passengers by coaches to any point, or to carry passengers by any mode of conveyance to C., having contracted with the plaintiff to carry him by rail to P. and thence by coach to C., and the plaintiff having been injured while travelling by coach from P. to C., it was held that the defendant was not liable to the plaintiff for such injuries and was not estopped from pleading that its contract with the plaintiff was *ultra vires*; but the doctrine of this case is not generally accepted, and the rule is that which is stated in the heading of this section, and which is further illustrated by the cases as to the liability of railways for negligence upon the part of connecting railways.

¹ 22 Conn. 1, 23 Id. 609.

CHAPTER II.

CONTRIBUTORY NEGLIGENCE.

- I. Contributory negligence in general.
- II. The rule in *Davies v. Mann*.
- III. The case of *T. & F. S. P. Ry. v. Boudrou*.
- IV. Comparative negligence.
- V. Negligence in avoiding danger or inconvenience.
- VI. Non-performance of collateral statutory duty as proof of contributory negligence.
- VII. The contributory negligence of lunatics, idiots, and children.
- VIII. The plaintiff's contributory negligence when suing for injuries to another.
- IX. The attribution to the passenger of the carrier's contributory negligence.
- X. The attribution of the contributory negligence of one who has been killed to those who sue for damages for his death.
- XI. The attribution of the contributory negligence of the contracting party to the party on whose behalf the contract was made.
- XII. The attribution of the contributory negligence of parents and guardians to children.
- XIII. The attribution to the person injured of the contributory negligence of third persons.

I. CONTRIBUTORY NEGLIGENCE IN GENERAL.

Where the person injured, or the plaintiff, or any person whose negligence is attributable to the plaintiff, has so far contributed to the injury by his want of ordinary care, that, but for such want of ordinary care on his part, the injury would not have been done, the railway is not liable to the plaintiff in damages for such injury.

44. The doctrine of contributory negligence was first recognized in *Buttersfield v. Forrester*,¹ decided in 1809, where the defendant, for the purpose of repairing his house, having obstructed part of a public highway, the plaintiff, riding hard, at dusk, ran against the obstruc-

¹ 11 East 60.

tion, and was injured. Bayley, J., directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding extremely hard, and without ordinary care, they should find for the defendant. After a verdict for the defendant, a motion for a rule for a new trial on the ground of misdirection was refused, Ellenborough, C. J., saying, "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action : an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." In *Bridge v. G. J. Ry.*,¹ the plaintiff declared in case, averring a negligent management by the defendant of its train, whereby a collision was caused with a train in which the plaintiff was a passenger. The defendant pleaded specially that those managing the train on which the plaintiff was a passenger were so negligent that, "in part by their negligence, as well as in part by the defendant's negligence," the defendant's train ran against the other, etc. On demurrer, the plea was held bad in form, because it amounted to the general issue, and bad in substance, because it showed no ground for defeating the plaintiff's recovery, Parke, C. B., saying, "Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover ; if by ordinary care he might have avoided them he is the author of his own wrong."

45. The rule may, therefore, be formulated in these terms: where the person injured, or the plaintiff, or any person whose negligence is attributable to the plaintiff,

¹ 3 M. & W. 244.

has so far contributed to the injury by his want of ordinary care that, but for such want of ordinary care on his part, the injury would not have been done, the railway is not liable to the plaintiff in damages for such injury. Thus stated, the rule is supported by innumerable authorities.¹

46. The reason of the rule is that the defendant cannot justly be called upon to indemnify the plaintiff for a wrong which the plaintiff has done to himself. Thus, in *Heil v. Glanding*,² Strong, J., said, "the reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other is, not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much of the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct." While a defendant's actionable negligence consists in his failure to perform a duty which he owes to the plaintiff, the plaintiff's contributory negligence is merely a failure to perform a duty which he owes, not to the defendant, but to himself. The law, therefore, draws no distinction between a

¹ *Butterfield v. Forrester*, 11 East 60; *Tuff v. Warman*, 5 C. B. N. S. 573, 94 E. C. L.; *Bridge v. G. J. Ry.*, 3 M. & W. 244; *Holden v. L. N. G. & C. Co.*, 3 M. G. & S. 1, 54 E. C. L.; *Illott v. Wilkes*, 3 B. & Ald. 304, 5 E. C. L.; *Ellis v. L. & S. W. Ry.*, 2 H. & N. 424; *B. & P. R. R. v. Jones*, 95 U. S. 439; *P. R. R. v. Aspell*, 23 Penna. St. 147; *Hiee v. Kugler*, 6 Wh. 336; *Simpson v. Hand*, 6 Id. 311; *Wynn v. Allard*, 5 W. & S. 524; *Gould v. McKenna*, 86 Penna. St. 303; 13th & 15th Sts. P. Ry. v. *Boudrou*, 92 Id. 480; *Heil v. Glanding*, 42 Id. 493; *Sills v. Brown*, 9 C. & P. 601, 38 E. C. L.; *Creed v. P. R. R.*, 86 Penna. St. 139; *Cremer v. Portland*, 36 Wisc. 92; *H. & T. C. Ry. v. Gorbett*, 49 Tex. 573; *Mackey v. M. P. Ry.*, 18 Fed. Rep. 236; *K. C. R. R. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. R. Cas. 79; *Harper v. E. R. R.*, 3 Vroom. 88; *Deyo v. N. Y. C. R. R.*, 34 N. Y. 9; *J. R. R. v. Hendricks*, 26 Ind. 228; *Higgins v. H. & St. J. R. R.*, 36 Mo. 418; *Sullivan v. L. Bridge Co.*, 9 Bush 81.

² 42 Penna. St. 493, 498.

plaintiff's wilful or heedless subjection of himself to peril, and, in either case, the maxim "*volenti non fit injuria*" is applicable, for it is always to be presumed that one's failure to do one's duty to one's self is voluntary.

47. Contributory negligence may, therefore, be defined to be that want of reasonable care upon the part of the person injured which concurred with the negligence of the railway in causing the injury.

48. Contributory negligence can, therefore, be proved only by showing, *first*, that on the part of the plaintiff something has either been done, or omitted to be done, which, under the circumstances and from a prudent regard for the plaintiff's safety, ought, in the one case, to have been omitted, or, in the other case, to have been done; and, *second*, that that particular act of commission or omission on the part of the plaintiff concurred with the defendant's breach of duty in causing the injury to the plaintiff. If the proofs fail to show either of these elements the plaintiff's contributory negligence cannot be said to be established. In this view, it is essential, as Coleridge, J., said,¹ that that negligence upon the part of the plaintiff which is to bar his recovery, should have substantially contributed to the occurrence of the injury, and not merely to its amount.²

49. In *Martin v. G. N. Ry.*,³ Jervis, C. J., and Maule, J., doubted whether the defence of contributory negligence is available to a railway when sued by a passenger for personal injuries, for the reason that the

¹ *Sills v. Brown*, 9 C. & P. 601, 38 E. C. L.

² See, also, *Wasmer v. D. L. & W. R. R.*, 80 N. Y. 212, 1 Am. & Eng. R. R. Cas. 122; *Thirteenth & Fifteenth St. P. Ry. v. Boudrou*, 92 Penna. St. 475; *Hatfield v. C. R. I. & P. Ry.*, 61 Iowa 434, 11 Am. & Eng. R. R. Cas. 153; *L. & M. M. R. R. v. Montgomery*, 7 Ind. 474.

³ 16 C. B. 196, 81 E. C. L.

action is grounded not upon a pure tort, but upon a tort which is also a breach of a contract to carry safely. The judgment in the cause, however, turned upon the point that, at the trial, the defence had been advisedly put, not upon any theory of contributory negligence, but upon the fact of the plaintiff's negligence being the sole cause of his injury, and that the jury, upon evidence satisfactory to them and to the judge, had determined that issue adversely to the defendant. The doubt suggested in that case does not appear to be supported by other authority.

That duty of ordinary care upon the part of the person injured, whose non-performance is contributory negligence, is not unvarying, but is dependent upon the circumstances of the particular case.

50. Contributory negligence upon the part of the person injured, or upon the part of any one whose negligence is attributable to him, cannot become a material issue in the cause unless negligence upon the part of the railway be either proven or conceded. The duty of ordinary care upon the part of the person injured for his own safety is not unvarying, but is dependent upon the circumstances of the particular case, and also upon the mental and physical capacity of the person injured. Thus, the person injured is to be held to the exercise of a lower degree of care, when, by negligence upon the part of the railway, his vigilance has been put to sleep and he has been lulled into a condition of security, as, for instance, when the railway has, by leaving open a gate at a crossing, intimated that the line may be safely crossed; or, when the railway has, by the mode of construction and location of its stations or cars, impliedly warranted the safety of a passenger in some particular place in its stations or cars; or, when a railway servant has invited a passenger to

occupy a particular position under an express or implied representation that he may safely occupy that position. It is not contributory negligence in the person injured, if, under circumstances of imminent danger, when there is no time for reflection, he fail to act in the exercise of a cool and deliberate judgment.¹

51. Neither the moral quality of the plaintiff's act, nor its motive, however admirable, can, if that act be a proximate cause of his injury, relieve him from the legal consequences of contributory negligence.²

52. Nor does the belief of a contributorily negligent plaintiff, however reasonable, that he will not be injured by the negligent act, avail to relieve him from its legal consequences.³

53. Where the contributory negligence of the person injured is dependent upon his knowledge of the existence of a fact, he, if not physically or mentally incapacitated, must be assumed to have had that knowledge, if he had such opportunity of knowing the fact as would have made it known to a person of average capacity exercising ordinary care for his own safety.⁴

Contributory negligence upon the part of the person injured will not avail as a defence to the wrongdoer in the case of an injury wilfully inflicted.

• 54. When the injury has been wilfully inflicted, contributory negligence upon the part of the sufferer is obviously not available as a defence to the wrongdoer.⁵

¹ P. R. R. v. Werner, 89 Penna. St. 59; Schall v. Cole, 107 Id 1; Mark v. St. P., M. & M. Ry., 30 Minn. 493, 12 Am. & Eng. R. R. Cas. 86.

² E. & C. R. R. v. Hiatt, 17 Ind. 102; *sed cf.* Eckert v. L. I. R. R., 43 N. Y. 503.

³ Muldowney v. I. C. Ry., 36 Iowa 462.

⁴ P. R. R. v. Henderson, 43 Penna. St. 449.

⁵ Brownell v. Flagler, 5 Hill 282; T. R. R. v. Munger, 5 Denio 267; Sandford v. 8th Ave. R. R., 23 N. Y. 343; Steinmetz v. Kelly, 72 Ind. 442; L. & N. R. R. v. Collins, 2 Duvall 114.

II. THE RULE IN DAVIES *v.* MANN.

Although negligence upon the part of the plaintiff may have in fact contributed to his injury, the railway will nevertheless be liable, if its servants could by the exercise of ordinary care have avoided the injury to the plaintiff.

55. This qualification of the general rule was first enunciated in *Davies v. Mann*,¹ where the plaintiff having fettered the front legs of his donkey had turned him out into the public highway to graze, and while there the defendant, driving recklessly, ran over the donkey, and a verdict having been obtained by the plaintiff, a rule for a new trial was refused: Abinger, C. B., saying, "as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there;" and Parke, B., after referring to *Butterfield v. Forrester*, and *Bridge v. G. J. Ry.*, as authorities sustaining the plaintiff, adding, "although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." In *Mayor of Colchester v. Brooke*,² Denman, C. J., cites *Davies v. Mann* as authority for the proposition, that, "as a general rule of law, every one, in the conduct of that which may be harmful to others, if misconducted, is bound to the use of due care and skill; and the wrongdoer is not without the pale of the law for this purpose;" and in *Dimes v. Petley*,³ Campbell, C. J.,

¹ 10 M. & W. 546.

² 7 Q. B. 339, 377, 53 E. C. L.

³ 15 Q. B. 276, 283, 69 E. C. L.

takes the same view of that case. In *Dowell v. Navigation Co.*,¹ Campbell, C. J., said, "in a court of common law the plaintiff has no remedy, if his negligence *in any degree contributed* to the accident. In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and, in these cases, the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted *donkey case*: *Davies v. Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss." In *Tuff v. Warman*,² Wightman, J., refers to the cases which I have cited, and says, "mere negligence or want of ordinary care or caution would not, however, disentitle him (the plaintiff) to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." In *Witherly v. Regents Canal Co.*,³ Byles, J., treats the rule in *Davies v. Mann* as equivalent to a declaration that the plaintiff's contributory negligence must, in order to bar his recovery, have been a proximate cause of the injury.

56. The latest exposition of this doctrine in England

¹ 5 E. & B. 195, 206, 85 E. C. L.
12 C. B. N. S. 2, 104 E. C. L.

² 5 C. B. N. S. 573, 94 E. C. L.

is to be found in the case of *Radley v. L. & N. W. Ry.*,¹ where the plaintiff being a colliery owner, upon whose premises there was a siding connected with the defendant's line and over that siding a bridge eight feet high, the defendant on a Saturday afternoon, after the plaintiff's servants had left work, ran upon the siding some trucks, one of which had a broken truck piled upon it to the height of eleven feet. On Sunday evening the defendant brought other empty trucks on the siding, and pushing them forward the truck on which was piled the broken truck struck the bridge and broke it down. The plaintiff brought his action to recover for the loss of the bridge. The defence was contributory negligence on the part of the plaintiff in permitting the trucks to remain on the siding from Saturday afternoon until Sunday evening. At the trial Brett, J., directed the jury in the following terms: "the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own. In other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiff; if you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants." The jury found for the defendants, and the Exchequer of Pleas made absolute a rule for a new trial, upon the ground of misdirection. The Exchequer Chamber reversed and entered judgment for the defendant, but the House of Lords reversed the Exchequer Chamber and reinstated the judgment of the Exchequer of Pleas making absolute the rule for a new trial, Lord Penzance saying: "The law in these cases of negligence is perfectly settled and beyond dispute. The first proposition is a general one, to this

¹ L. R. 9 Ex. 91, 10 Id. 100, 1 App. Cas. 754.

effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributes to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition, as one of law, cannot be questioned." The case of Davies *v.* Mann has been followed in many other cases.¹

57. The rule is sometimes stated that the plaintiff,

¹ Radley *v.* L. & N. W. Ry., L. R. 9 Ex. 91, 10 Id. 100, 1 App. Cas. 754; Dowell *v.* G. S. Nav. Co., 5 E. & B. 195, 85 E. C. L.; Witherly *v.* Regents Canal Co., 12 C. B. N. S. 2, 104 E. C. L.; Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L.; Morrisey *v.* Wiggins Ferry Co., 43 Mo. 380; Hulsencamp *v.* C. R. R., 37 Id. 537; Kennedy *v.* N. M. R. R., 36 Id. 351; Boland *v.* Missouri R. R., Id. 484; Meyer *v.* Pacific R. R., 40 Id. 153; Liddy *v.* St. Louis R. R., Id. 506; Scott *v.* D. & W. Ry., 11 Irish Com. Law 377; C. & A. R. R. *v.* Gretzner, 46 Ill. 76; C. & A. R. R. *v.* Pondrum, 51 Id. 333; K. C. Ry. *v.* Dills, 4 Bush 593; L. & C. Ry. *v.* Sickings, 5 Id. 1; M. & W. R. R. *v.* Davis, 18 Ga. 679; 19 Id. 437; M. & W. R. R. *v.* Winn, Id. 440; Raisin *v.* Mitchell, 9 C. & P. 613, 38 E. C. L.; Mayor of Colchester *v.* Brooke, 7 Q. B. 339, 378, 53 E. C. L.; Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L.; Thompson *v.* N. E. Ry., 2 B. & S. 106, 110 E. C. L.; Wyatt *v.* G. W. Ry., 6 B. & S. 709, 118 E. C. L.; Isbell *v.* N. Y. & N. H. R. R., 27 Conn. 393; Meeks *v.* S. P. R. R., 56 Cal. 513, 8 Am. & Eng. R. R. Cas. 314; Needham *v.* S. F. & S. J. R. R., 37 Cal. 409; C. C. R. R. *v.* Holmes, 5 Colo. 197, 8 Am. & Eng. R. R. Cas. 410; The State *v.* B. & O. R. R., 24 Md. 84; Trow *v.* V. C. Ry., 24 Vt. 487; N. H. S. & T. Co. *v.* Vanderbilt, 16 Conn. 421; Kerwhacker *v.* C. C. C. & I. Ry., 3 Ohio St. 172; Burnett *v.* B. & M. R. R., 16 Neb. 332, 19 Am. & Eng. R. R. Cas. 25; M. C. R. R. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng. R. R. Cas. 261; Kean *v.* B. & O. R. R., 61 Md. 154, 19 Am. & Eng. R. R. Cas. 321; Johnson *v.* H. R. R. R., 5 Duer 27; Button *v.* H. R. R. R., 18 N. Y. 248; B. & O. R. R. *v.* The State, 33 Md. 542; L. C. & L. R. R. *v.* Mahony, 7 Bush (Ky.) 235; L. & N. R. R. *v.* Filbern, 6 Id. 574; Thayer *v.* St. L., A. & T. H. Ry., 22 Ind. 26; C. St. Ry. *v.* Steen, 42 Ark. 321, 19 Am. & Eng. R. R. Cas. 30.

though contributorily negligent, can recover if the railway's servants, after becoming aware of the dangerous position into which the plaintiff, by his contributory negligence, had brought himself, could have avoided the injury to him by the exercise of due care on their part, and failed to exercise that due care.¹

58. The rule in Davies *v.* Mann has been misunderstood and misapplied. It means only that that negligence upon the part of the plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury, and that it is not a proximate, but only a remote, cause of the injury, when the defendant, notwithstanding the plaintiff's negligence, might, by the exercise of ordinary care and skill, have avoided the doing of the injury. Thus stated, the rule is consistent with the theory upon which the doctrine of contributory negligence is based, and furnishes no support for that of comparative negligence.

59. The rule in Davies *v.* Mann has not been followed in Pennsylvania. In Reeves *v.* D., L. & W. R. R.,² where the plaintiff sued to recover for cattle killed at a highway crossing, judgment on a verdict for the defendant was reversed for misdirection in failing to charge the jury, "that if the injury result from the want of care of both parties, neither has remedy against the other; but if it be not in any degree ascribable to the negligence of one party, due regard being had to all the circumstances of his position, he may have redress from the other." In Stiles *v.* Geesey,³ the plaintiff's wagon and horses, while hitched to a tree on a highway

¹ Nelson *v.* A. & P. R. R., 68 Mo. 593; Price *v.* St. L., K. C. & N. R. R., 72 Mo. 414, 3 Am. & Eng. R. R. Cas. 365; Isabel *v.* H. & St. J. R. R., 60 Mo. 482; Harlan *v.* St. L., K. C. & N. R. R., 65 Mo. 22; Scoville *v.* H. & St. J. R. R., 81 Mo. 434, 22 Am. & Eng. R. R. Cas. 534; Zimmerman *v.* H. & St. J. R. R., 71 Mo. 476, 2 Am. & Eng. R. R. Cas. 191.

² 30 Penna. St. 454.

³ 71 Penna. St. 439.

and unattended, were struck and injured by the defendant's wagon drawn by horses, the defendant's servant walking at some distance from the team and not guiding them. Judgment on a verdict for the plaintiff was reversed in error, for misdirection in instructing the jury, that if they found that the defendant had been negligent in failing to guide his team it constituted no defence to him that the plaintiff did not exercise ordinary care in leaving his property where it was. In *Creed v. P. R. R.*,¹ where the plaintiff sued to recover for injuries resulting from the derailment of the train in which he was riding, and the defence was based on the contributory negligence of the plaintiff in riding in what was claimed to be a position of danger, the court having left to the jury the questions of negligence and contributory negligence, and a verdict having passed for the plaintiff, judgment *non obstante veredicto* was entered for the defendant, upon the ground that the plaintiff was contributorily negligent, and that judgment was reversed in error, Gordon, J., saying: "The test for contributory negligence is found in the affirmative of the question 'Does that negligence contribute in any degree to the production of the injury complained of?' If it does, there can be no recovery; if it does not, it is not to be considered."² It is obvious that these cases are not reconcilable with *Davies v. Mann*, and the many cases which have followed in its lead.

¹ 86 Penna. St. 139.

² See, also, *L. S. N. R. R. v. Norton*, 24 Penna. St. 465; *Heil v. Glanding*, 42 Id. 493; *C. R. R. r Armstrong*, 49 Id. 193.

III. THE PENNSYLVANIA RULE IN 13TH AND 15TH STS.
P. Ry. v. Boudrou.

60. It is said, in some of the authorities, that the plaintiff's negligence should have been a concurring cause, and not merely a condition, of the plaintiff's injury. Of course, there is an obvious distinction between the cause, that is, that which produces the injury, and those conditions or incidents which are the accidental, but not necessary, concomitants of the injury, and, therefore, that negligence upon the part of the plaintiff, which can be accurately characterized as a condition of the injury, is not in any proper sense contributory negligence, because it does not contribute to the injury. There is, however, a Pennsylvania case, in which this distinction seems to have been carried to a dangerous extent. In 13th and 15th Sts. *P. Ry. v. Boudrou*,¹ the plaintiff, having become a passenger at night upon a street car which was so crowded that he could not obtain a seat, stood upon the back platform, and while there was injured by being struck by the pole of another car of the same line which, following the car upon which the plaintiff was riding, came into collision with that car by reason of the breaking of the brake chain. At the trial, the judge directed the jury that the danger of a collision between the car upon which the passenger was riding and another car following it was not one of the dangers which render it perilous to ride upon the rear platform, and that, therefore, if the jury should find the plaintiff negligent in standing upon the rear platform, and yet find that the collision could not have happened but for the negligence of the driver of the following car, the plaintiff's negligence was to be considered too remote to constitute a cause of the injury, and therefore

¹ 92 Penna. St. 475.

could not bar his recovery. The judge also declined to direct the jury that, if they should find from the evidence that the plaintiff occupied the back platform of the car on which he received his injury for the purpose of being carried as a passenger, he was guilty of contributory negligence. Judgment upon a verdict for the plaintiff was affirmed in error, Trunkey, J., in delivering the judgment of the Supreme Court, saying: "The large number of passengers in this city who voluntarily stand upon the platforms, because there is neither sitting nor standing room in the cars, do not, and ought not to, anticipate that they will be run over by following cars. Their position has no tendency to induce the driving of one car into another. Whatever the degree of their negligence in riding on the platform, and the risks they take in so doing, every one knows that so long as he remains there, he is in no danger of being run down by a car, unless from its heedless handling. When the plaintiff was struck, his post was a condition, but not a cause, of the injury. It neither lessened the speed of the car he was on nor increased that of the other; his presence was not a cause of the broken chain and reckless driving of car 14; his place was an incident of an over-crowded car, where the conductor had left the platform to give him standing room, and had not pointed him to a seat or requested him to enter the car." Sharswood, C. J., and Paxson, J., dissented, holding that the question of the plaintiff's contributory negligence should have been submitted to the jury. The dissenting judgment of Paxson, J., is reported in 8 Weekly Notes of Cases 244. This case stands alone, for in all the other cases dealing with the question of the plaintiff's contributory negligence in standing upon the platform of a street car, it is held that the effect of the act is, at least, a question for the jury. The dangerous extent of the

doctrine laid down in the judgment of the court is obvious, for it can be said in every conceivable case that the contributory negligence of the plaintiff was not a cause of the defendant's negligence; thus, when a driver approaches a railway line at a highway crossing without looking or listening for approaching trains, and on the crossing is run down by an engine whose driver has given no warning of its coming, his contributory negligence in failing to take that precaution, the taking of which is generally held to be an indispensable prerequisite to his recovery of damages, is, if the judgment of the Boudrou case be right, merely a condition and not a cause of the injury, for his failure to look and listen did not affect the speed of the approaching train, nor was it the cause of the engine driver's failure to give due warning of the approach of his train to the crossing. Precisely the same reasoning can be applied to every possible case of contributory negligence. If the judgment in the Boudrou case is to stand unreversed, there is in Pennsylvania, at least, an end of the doctrine of contributory negligence.

IV. COMPARATIVE NEGLIGENCE.

In Illinois, Georgia, and Tennessee, a contributorily negligent plaintiff is, under certain conditions, held to be entitled to recover damages against a railway.

61. The doctrine of comparative negligence is administered to its full extent in Illinois, and to a modified extent in Georgia and Tennessee. In Illinois the rule is, that if the injured party omits some slight precaution for his safety, and if the railway omits all care on its part, or, in other words, if the plaintiff's negligence be slight, and that of the railway when compared with that

of the plaintiff be gross, a recovery can nevertheless be had.¹

62. In Georgia the rule, as deducible from the cases, appears to be that if the contributory negligence on the part of the plaintiff has been gross he cannot recover, but that if his contributory negligence has been slight, as compared with the negligence on the part of the defendant, the latter is to be held liable, but the jury are then to take that contributory negligence into consideration in mitigation of the damages recoverable from the defendant.²

63. The rule in Tennessee is, as stated by Mr. Charles Fiske Beach, Jr., in his valuable treatise upon Contributory Negligence, substantially the same as that which prevails in Georgia.³

64. There are many cases in which the theory of comparative negligence has been disapproved.⁴ Nor is the rule in itself reasonable or defensible upon principle. Where the plaintiff's want of care has been a proximate cause of his injury, the defendant cannot, under any

¹ W. St. L. & P. Ry. *v.* Wallace, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; L. N. A. & C. Ry. *v.* Shires, 108 Ill. 617, 19 Am. & Eng. R. R. Cas. 387; C. B. & Q. R. R. *v.* Van Patten, 74 Ill. 91; I. C. R. R. *v.* Patterson, 93 Id. 290; G. & C. U. R. R. *v.* Jacobs, 20 Id. 478; C. & N. W. Ry. *v.* Sweeny, 52 Id. 330; R. R. I. & St. L. R. R. *v.* Delaney, 82 Id. 198.

² A. & R. A. L. R. R. *v.* Ayers, 53 Ga. 12; C. R. R. *v.* Gleason, 69 Id. 200; A. & S. R. R. *v.* McElmurry, 24 Id. 75; A. & W. P. R. R. *v.* Wyly, 65 Id. 120; Thompson *v.* C. R. R., 54 Id. 509; Campbell *v.* A. R. R., 53 Id. 488; Hendricks *v.* W. & A. R. R., 52 Id. 467; M. & W. R. R. *v.* Davis, 27 Id. 113.

³ Beach on Contributory Negligence, p. 97; N. & C. R. R. *v.* Carroll, 6 Heisk. 347; R. R. *v.* Walker, 11 Heisk. 383; L. & N. R. R. *v.* Flemming, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. R. Cas. 347.

⁴ L. S. N. R. R. *v.* Norton, 24 Penna. St. 465; Heil *v.* Glanding, 42 Id. 493; Reeves *v.* D. L. & W. R. R., 30 Id. 464; Stiles *v.* Geesey, 71 Id. 439; C. R. R. *v.* Armstrong, 49 Id. 193; Wilds *v.* H. R. R., 24 N. Y. 432; Penna. Co. *v.* Roney, 89 Ind. 453; O'Keefe *v.* C. R. I. & P. R. R., 32 Iowa 467; P. R. R. *v.* Righter, 42 N. J. Law 180; Gothard *v.* A. G. S. R. R., 67 Ala. 114; Potter *v.* C. & N. W. Ry., 21 Wise. 372; Marble *v.* Ross, 124 Mass. 44; H. & T. C. R. R. *v.* Gorbett, 49 Tex. 573; K. P. Ry. *v.* Peavey, 29 Kans. 170, 11 Am. & Eng. R. R. Cas. 260.

possible theory of duty or implied contract, be called upon to indemnify him for that injury. To permit the plaintiff's recovery under such circumstances is to decide that he may hold the defendant responsible for his non-performance of his duty to himself, and such a conclusion is not reconcilable with the theory upon which the general doctrine of negligence is based. The practical difficulty in the administration of the doctrine of comparative negligence is great. It is not easy for trained judges, and it is always difficult for untrained jurymen, to determine by comparison, in cases where both plaintiff and defendant have by negligence contributed to the injury, whose negligence exceeds that of the other. As Woodward, J., said in *L. S. N. R. R. v. Norton*,¹ "the law has no scales to determine in such cases whose wrong doing weighed most in the compound that occasioned the mischief," and the result of the application of the rule in almost all causes, wherein individuals are plaintiffs and railways are defendants, is that the jury must pass upon the question of contributory negligence, for however clearly it might be proven that the plaintiff had failed to observe that care which a due regard to his own interests required of him, it would be for the jury to say whether or not the railway's negligence was gross as compared with that of the plaintiff, and in every such case the jury would find for the plaintiff.

¹ 24 Penna. St. 469.

V. NEGLIGENCE IN AVOIDING DANGERS OR INCONVENIENCES.

A person is not chargeable with contributory negligence who is injured in the effort to escape from an imminent peril to which he has been exposed by the negligence of the railway; nor is a person chargeable therewith who is injured in the attempt to obviate, by an act not essentially dangerous, an inconvenience to him caused by the negligence of the railway.

65. I have given my reasons for the opinion that the real question in cases of injuries incurred in flying from a danger, or in attempting to obviate some inconvenience caused by negligence or breach of contract on the part of the railway, is, whether or not the negligence on the part of the railway is the proximate cause of the plaintiff's injury, rather than whether or not the plaintiff is contributorily negligent; but in many of the cases the question is treated as one of contributory negligence, and it is generally held that a person is not chargeable with contributory negligence who is injured in the effort to escape from an imminent peril to which he has been exposed by negligence on the part of the railway.¹ Nor is it contributory negligence if the plaintiff has been injured in the effort to avoid an inconvenience by an act "not obviously dangerous, and

¹ Jones *v.* Boyce, 1 Starkie 493, 2 E. C. L.; Stokes *v.* Saltonstall, 13 Pet. 181; N. & C. R. R. *v.* Erwin, 3 Am. & Eng. R. R. Cas. 465; Caswell *v.* B. & W. R. R., 98 Mass. 194; E T. V. & G. R. R. *v.* Gurley, 12 Lea (Tenn.) 45, 17 Am. & Eng. R. R. Cas. 568; C. R. R. *v.* Rhodes, 56 Ga. 645; C. R. R. *v.* Roach, 64 Id. 635, 8 Am. & Eng. R. R. Cas. 79; P. B. & W. R. R. *v.* Rohrman, 13 Weekly Notes of Cases 258, 12 Am. & Eng. R. R. Cas. 176; Smith *v.* St. P., M. & M. Ry., 30 Minn. 169, 9 Am. & Eng. R. R. Cas. 262; Iron R. R. *v.* Mowery, 36 Ohio St. 418, 3 Am. & Eng. R. R. Cas. 361; Buel *v.* N. Y. C. R. R., 31 N. Y. 314; S. W. R. R. *v.* Paulk, 24 Ga. 356; Twomley *v.* C. P., N. & E. R. R. R., 69 N. Y. 158; Mark *v.* St. P., M. & M. Ry., 30 Minn. 493, 12 Am. & Eng. R. R. Cas. 86.

executed without carelessness."¹ On the other hand, it is contributory negligence, if, in the attempt to avoid that which is merely inconvenient and in no sense dangerous, the person injured encounters a danger obviously apparent to the minds of reasonable men.²

66. Two Pennsylvania cases seem to be open to criticism. In *Johnson v. W. C. & P. R. R.*,³ by arrangement two railway companies, whose lines met at a junction, sold tickets over each other's line. A passenger by one of the lines, having arrived at the junction just as the connecting train was leaving, attempted, although he was carrying luggage in both arms, to board that train after it was in motion, and in the effort was thrown down and injured. Judgment on a verdict for the defendant was reversed in error, because the judge at the trial directed the jury that, "if the train was distinctly running upon the track when the plaintiff attempted to enter, he was guilty of negligence, and cannot recover," the Supreme Court holding that it should have been left to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train, when in motion, was so apparent as to have made it the duty of the plaintiff to desist from the attempt. In *W. P. P. Ry. v. Whipple*,⁴ a female passenger got into a crowded street car and voluntarily

¹ *Gee v. Metropolitan Ry.*, L. R. 8 Q. B. 161; *Clayards v. Dethick*, 12 Q. B. 439, 64 E. C. L.; *Wyatt v. G. W. Ry.*, 6 B. & S. 709, 118 E. C. L.; the judgment of Kelly, C. B., in *Siner v. G. W. Ry.*, L. R. 3 Ex. 150; *Johnson v. W. C. & P. R. R.*, 70 Penna. St. 357; *W. P. P. Ry. v. Whipple*, 5 Weekly Notes of Cases 68.

² *Adams v. L. & Y. Ry.*, L. R. 4 C. P. 739; *Siner v. G. W. Ry.*, L. R. 3 Ex. 150. 4 Id. 117; *G. H. & S. A. R. R. v. Le Gierse*, 51 Tex. 189; *Dumont v. N. O. & C. R. R.*, 9 La. An. 441; *I. C. R. R. v. Able*, 59 Ill. 131; *Gavett v. M. & L. R. R.*, 16 Gray 501; *J. R. R. v. Hendricks*, 26 Ind. 228; Judgment of Bramwell, L. J., in *Lax v. Darlington*, 5 Ex. D. 28; *P. R. R. v. Aspell*, 23 Penna. St. 147.

³ 70 Penna. St. 357.

⁴ 5 Weekly Notes of Cases (Penna.) 68.

stood, without taking hold of the straps hanging from the roof of the car, which were within her reach, and which were placed for the support of standing passengers. She alone, of all the passengers in the car, was thrown down by the jolt of a sudden stop, and, in cross-examination, she excused her failure to take the strap because her dress was so tightly laced that she could not raise her arm. She admitted that, except for her stays, she could have held the strap, and that she could put her fingers partly through it, and that the reason why she did not hold the strap was that it would have disarranged her dress. The judge, at the trial, directed the jury that the plaintiff was not disentitled to recover by reason of her failure to avail herself of the support which the straps would have afforded her, if she could not "conveniently" reach them, and upon a bill of exceptions to that direction judgment upon a verdict for the plaintiff was affirmed in error. In Johnson's case there was really no question for the jury, for the plaintiff's own testimony showed that, while encumbered with the luggage he was carrying, he attempted to board a moving train; and in Whipple's case there was an obvious misdirection in permitting the jury to consider the possibility of inconvenience to the plaintiff in the disarrangement of her dress, as an adequate excuse for her voluntarily incurring the risk of standing without support in a moving car.

VI. NON-PERFORMANCE OF STATUTORY DUTY.

The failure of the person injured to perform a collateral statutory duty ought not to be treated as contributory negligence.

67. The fact that the person injured was, at the time of the injury, acting in disobedience to a collateral statutory duty, ought not to be held to be such con-

tributory negligence as bars his recovery. Thus, it has been held that disobedience to the laws, which, in some States, require the observance of Sunday as a day of rest and abstinence from worldly business, will not prevent a plaintiff, who is injured while transacting business on Sunday, from recovering from a defendant whose negligence has caused the injury.¹ The contrary doctrine is, however, asserted in many cases.²

68. The extent to which the doctrine of these cases can be carried is illustrated in some of the cases. In the Massachusetts case, a telegraph company had failed to obtain from the municipal authorities of Boston the written evidence of permission to construct a telegraph line in that city, and one of the telegraph companies' servants, while engaged in climbing a pole and carrying a wire, was injured by a passenger car running against the wire, and, after verdict for the plaintiff, the defendant's exceptions were sustained, on the ground that the jury should have been instructed that the plaintiff was doing an illegal act, which contributed to his injury, and that he could recover for nothing less than wanton injury. In the Georgia case, the plaintiff, a servant of the railway, was injured while engaged in the perform-

¹ *Mohney v. Cook*, 26 Penna. St. 342; *P. & R. R. v. Tow-boat Co.*, 23 How. 209; *Carroll v. S. J. Co.*, 58 N. Y. 126; *McArthur v. Green Bay Co.*, 34 Wisc. 139; *Sawyer v. Oakman*, 7 Blatch. C. C. 290; *Schmid v. Humphrey*, 48 Iowa 652; *Morris v. Lichfield*, 35 N. H. 271; *Bigelow v. Reed*, 51 Me. 325; *Hamilton v. Godding*, 55 Id. 428; *Baker v. Portland*, 58 Id. 199; *Kerwhacker v. C. C. & C. Ry.*, 3 Ohio St 172; *Knowlton v. M. C. R. R.*, 59 Wise. 278, 16 Am. & Eng. R. R. Cas. 330; *Baker v. Portland*, 58 Me. 199.

² *Bosworth v. Swansey*, 10 Metc. 363; *Stanton v. Metropolitan R. R.*, 14 Allen 485; *Smith v. B. & M. R. R.* 120 Mass. 490; *Lyons v. Desotelle*, 124 Id. 387; *Bucher v. Fitchburg R. R.*, 131 Id. 156, 6 Am. & Eng. R. R. Cas. 212; *McGrath v. Merwin*, 112 Id. 467; *Day v. Highland St. Ry.*, 135 Id. 113, 15 Am. & Eng. R. R. Cas. 150; *Bauks v. H. St. Ry.*, 136 Mass. 485, 19 Am. & Eng. R. R. Cas. 139; *Wallace v. Cannon*, 38 Ga. 199.

The Massachusetts Statute of 1877, c. 232, provides that the statutes "prohibiting travelling on the Lord's Day," shall not be available to railways as a defence in actions for personal injuries.

ance of his duty to the railway, upon a train which was carrying troops and munitions of war for the Confederate government, and it was held that his violation, in that respect, of his duty as a citizen to the government of the United States barred his recovery. So, in *Martin v. Wallace*,¹ and in *Turner v. N. C. R. R.*,² it was held that soldiers in the Confederate service who were injured while travelling by railway in the performance of military duty could not recover from the railways for injuries caused by their negligence.

69. The right doctrine is, that that violation of public or private duty which is collateral to the injury cannot be in law regarded as an efficient cause of the injury, and for that reason cannot be considered as contributory negligence. Tried by this test, the cases referred to in the last section were wrongly decided.

VII. LUNATICS, IDIOTS, AND CHILDREN.

Lunatics, idiots, and children are to be held only to the exercise of that degree of care and discretion which ought reasonably to be expected of persons of their age and capacity.

70. A higher degree of care is to be required of persons of mature years than of infants, and of persons in the full possession of their faculties than of those of inferior mental or physical efficiency. Lunatics, idiots, and children are only to be held to the exercise of that degree of care and discretion which ought reasonably to be expected in such persons, having regard to the age and mental condition of the individual and the circumstances of the particular case. Thus in *Lynch v. Nurdin*,³ the defendant's servant having negligently left a cart and horse standing unattended in a highway, a child, while climbing into the cart, was thrown down and injured

¹ 40 Ga. 52.

² 63 N. C. 522.

³ 1 Q. B. 29, 41 E. C. L.

by the movement of the cart, another child having started the horse. After verdict for the plaintiff, a rule for a new trial was refused. Denman, C. J., said, "but the question remains, can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant, which produced it." In *W. & G. Ry. v. Gladmon*,¹ where a child of seven years of age sued to recover for injuries resulting from being run over by a railway car on a street, judgment upon a verdict for the plaintiff was affirmed in error, Hunt, J., saying, "the rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of

¹ 15 Wall. 401.

seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." In *Rauch v. Lloyd*,¹ the plaintiff, seven years of age, in performing an errand, had safely crossed the track of a railroad at a public crossing. On returning he found the crossing blocked by the defendant's cars, and while endeavoring to pass under one of them, the cars started, and the plaintiff was run over and injured. The judge at the trial instructed the jury in these terms: "has or has not a boy who is capable of performing an errand sufficient intelligence and discretion to know the hazard of creeping under a train of cars liable to be started at any moment? And had or had not the plaintiff such intelligence and discretion?" Judgment having been entered on a verdict for the defendant, was reversed in error. Woodward, J., in delivering the judgment, said: "Children are to be held responsible only for the discretion of children. * * * If he had gone out of his way to place himself under the cars, it might be accounted rashness, even in a child; but pursuing the highway he may well have supposed that the men who placed the cars there expected him to pass under them. Considering his age and all the circumstances of the case, we see nothing that would justify the imputation of negligence or imprudence. He acted like a child, and he is not to be judged as a man. * * * The strength of the plaintiff's case is that he had a right to pass along the highway, and the defendants had no right to obstruct it. He was in the exercise of a right, in a manner not unreasonable or imprudent for a child, and they injured him by reason of having stopped where they had no right

¹ 31 Penna. St. 358.

to stop." These cases are supported by many other authorities.¹

71. It is, therefore, not contributory negligence in an infant to fail to exercise that degree of care for his own safety, which may reasonably be expected in an adult of average capacity. On the same principle, it is not contributory negligence in a paralytic to fail to run away from an imminent danger, or in a blind man not to see an approaching peril, or in a deaf man to fail to hear a warning of danger, or in a foreigner who does not understand the English language to fail to appreciate and act upon a warning spoken in that tongue.²

The general rule is that it is for the jury to determine, under the circumstances of the particular case, what amount of reason and discretion ought to have been exercised by the injured infant.

72. Thus, in *P. R. R. v. Kelly*,³ the facts being almost identical with those in *Rauch v. Lloyd*, the judge at the trial instructed the jury to consider "whether the injury might have been avoided by the exercise of that care and discretion which was reasonably to be looked for in a boy of his years," and the jury having

¹ *Rauch v. Lloyd*, 31 Penna. St. 358; *P. R. R. v. Kelly*, Id. 372; *Oaklana Ry. v. Fielding*, 48 Id. 320; *Smith v. O'Connor*, Id. 218; *H. M. & F. Ry. v. Gray*, 3 Weekly Notes of Cases 421; *P. & R. R. R. v. Spearen*, 47 Penna. St. 300; *Kay v. P. R. R.*, 65 Id. 269; *P. C. P. Ry. v. Hassard*, 75 Id. 367; *Crissey v. H. M. & F. Ry.*, Id. 83; *Gray v. Scott*, 66 Penna. St. 345; *W. & G. Ry. v. Gladmon*, 15 Wall. 401; *Mangan v. B. C. R. R.*, 30 N. Y. 445; *W. P. Ry. v. Gallagher*, 16 Weekly Notes of Cases (Penna.) 413; *Barry v. N. Y. C. & H. R. R. R.*, 92 N. Y. 289, 13 Am. & Eng. R. R. Cas. 615; *Dowling v. N. Y. C. & H. R. R. R.*, 90 N. Y. 670, 12 Am. & Eng. R. R. Cas. 73; *Thurber v. H. B. M. & F. R. R.*, 60 N. Y. 326; *Reynolds v. N. Y. C. & H. R. R. R.*, 58 N. Y. 248; *Byrne v. N. Y. C. & H. R. R. R.*, 83 N. Y. 620; *O'Connor v. B. & L. R. R.*, 135 Mass. 352, 15 Am. & Eng. R. R. Cas. 362; *McMahon v. N. C. Ry.*, 39 Md. 438; *Schmidt v. M. & St. P. Ry.*, 23 Wisc. 186; *C. & A. R. R. v. Gregory*, 58 Ill. 226; *Boland v. M. R. R.*, 36 Mo. 484; *S. C. & P. R. R. v. Stout*, 17 Wallace 657; *Elkins v. B. & A. R. R.*, 115 Mass. 190.

² *Walter v. C. D. & M. Ry.*, 39 Iowa 33.

³ 31 Penna. St. 372.

found for the plaintiff, judgment on their verdict was affirmed in error.¹

Where the injured person is confessedly of average capacity and an infant only in legal theory, it ought not to be left to the jury to determine what amount of discretion ought, under the circumstances of the particular case, to have been exercised by the injured person.

73. The general rule, as stated in the preceding section, is, that it is for the jury to determine what amount of reason and discretion ought, under the circumstances of the particular case, to have been exercised by the injured infant, but, of course, this doctrine cannot reasonably be applied in the cases of those who are infants only in legal theory, as, for instance, those who are between fourteen and twenty-one years of age. In *Nagle v. A. V. R. R.*,² where there was affirmed in error a judgment of nonsuit upon the ground of the contributory negligence of the plaintiff, a boy of between fourteen and fifteen years of age, Paxson, J., in a carefully reasoned judgment says: "the law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age

¹ See also *Johnson v. C. & N. W. Ry.*, 49 Wisc. 529, 1 Am. & Eng. R. R. Cas. 155; *Ewen v. C. & N. W. Ry.*, 38 Wisc. 614; *Townley v. C. M. & St. P. Ry.*, 53 Wisc. 626, 4 Am. & Eng. R. R. Cas. 562; *Evansich v. G. C. & S. F. R. R.*, 57 Tex. 123, 6 Am. & Eng. R. R. Cas. 182, *Vickers v. A. & W. P. R. R.*, 64 Ga. 306, 8 Am. & Eng. R. R. Cas. 337; *M. & M. Ry. v. Crenshaw*, 65 Ala. 566, 8 Am. & Eng. R. R. Cas. 340; *Johnson v. C. & N. W. Ry.*, 56 Wisc. 274, 8 Am. & Eng. R. R. Cas. 471; *Nagel v. M. P. Ry.*, 75 Mo. 653, 10 Am. & Eng. R. R. Cas. 702; *P. & M. R. R. v. Hoehtl*, 12 Bush (Ky.) 41; *Reynolds v. N. Y. C. & H. R. R. R.*, 58 N. Y. 248; *Ihl v. F. S. St. R. R.*, 47 N. Y. 317; *Mulligan v. Curtis*, 100 Mass. 512; *O'Connor v. B. & L. R. R.*, 135 Mass. 352, 15 Am. & Eng. R. R. Cas. 362.

² 88 Penna. St. 35.

then must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is question of law for the court. Nor is its solution difficult. The rights, duties, and responsibilities of infants are clearly defined by the text writers as well as by numerous decisions. We have seen that the law presumes that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian and contract a marriage, is capable of harboring malice and of taking human life under circumstances that constitute the offence murder. It, therefore, requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."¹

¹ In *Colgan v. W. P. P. Ry.*, 4 Weekly Notes of Cases (Penna.) 400, Biddle, J., applied the same rule in the case of a boy sixteen years of age. See also *Dietrich v. B. & H. S. Ry.*, 58 Md. 347, 11 Am. & Eng. R. R. Cas. 115, where the injured boy was fifteen years of age; but in *Haycroft v. L. S. & M. S. Ry.*, 64 N. Y. 636, where the injured infant was a girl, who was nearly seventeen years of age, and whose injury was clearly due to her own carelessness, it was held that the degree of care to be exercised by her was not as high as that which was properly demandable of an older person, and that it was for the jury to determine whether or not she was contributorily negligent.

A railway owes to an infant, or to an adult of known mental or physical incapacity, a higher measure of duty than that which it owes to an adult of average mental and physical capacity.

74. Of course, a railway owes to an infant, or to a person of known inferior mental or physical capacity, a higher measure of duty than that which it owes to adults of average mental and physical capacity: thus in *Smith v. O'Connor*,¹ where the plaintiff, seven years of age, sued to recover damages from the defendant for his having negligently driven a horse and wagon over her at a public crossing, judgment on a verdict for the plaintiff was affirmed in error, Strong, J., saying, "undoubtedly the age and capacity of the person injured may have something to do with the question, whether a defendant was guilty of negligence, for every one has a right to act upon the supposition that adult persons will take ordinary care to avoid danger, while such a presumption is unwarranted respecting the conduct of those who have not yet reached years of discretion. Hence a higher degree of care and greater precaution are justly demanded to avoid injury to the latter." The same rule is applied where the railway servants know that an adult is incapacitated by deafness,² and in such a case they are bound to exercise for his protection a greater degree of care than they would be required to exercise if they did not know of his incapacity.

The fact of the infancy, or other incapacity, of the injured person will not supply the want of proof of negligence on the part of the railway.

75. The fact of the infancy of the injured party will not supply want of proof of negligence upon the part of the railway; thus, in *A. T. & S. F. Ry. v. Flinn*,³ the

¹ 48 Penna. St. 218.

² *I. & G. N. Ry. v. Smith*, 62 Tex. 252, 19 Am. & Eng. R. R. Cas. 21.

³ 24 Kans. 627, 1 Am. & Eng. R. R. Cas. 240.

plaintiff, a girl of five years of age, having, with another girl of the same age, been put by a relative on the railway's train to proceed to a way station, and the servants in charge of the train supposing them to be under the charge of a passenger not having collected any fare from them nor inquired as to their destination, and the train having arrived and after waiting a reasonable time for passengers to alight, had gotten under way, when the plaintiff in attempting to alight was injured, it was held that the railway was not liable. So in *C. B. & Q. R. R. v. Stumps*,¹ the railway was held not to be liable to a boy of seven years of age, who was injured while endeavoring to climb on one of the cars of a freight train, which was moving on the railway line which had been constructed on a public highway in a town, the proof showing that the train was moving slowly under proper control, and that it was adequately manned. So in *McMahon v. N. C. Ry.*,² the railway was held not to be liable to a boy less than six years of age, who was injured while attempting to crawl under a car in motion. So in *Ostertag v. P. R. R.*,³ the railway was held not to be liable for the death of a boy, who, having taken his seat beneath a freight car on a trestle was killed by a sudden starting of the train. So in *C. B. U. P. R. R. v. Henigh*,⁴ the railroad was held not to be liable for the death of a boy who climbed on a car on a siding, loosened its brakes, and fell off or jumped off in front of the car as it was moving by force of gravity on a down grade. So in *Wendell v. N. Y. C. & H. R. R. R.*,⁵ where a father sued for the death of a son seven years of age, who, being accustomed to go to school and about the streets without an attendant, was run over and killed at a level crossing of a highway in the city of Schenec-

¹ 69 Ill. 409.² 39 Md. 438.³ 64 Mo. 421.⁴ 23 Kans. 347.⁵ 91 N. Y. 420.

tady, while attempting to run across the line in plain view of an approaching train, it was held that the plaintiff should have been nonsuited, because the uncontradicted testimony produced on his behalf showed no negligence. So in *Moore v. P. R. R.*,¹ a similar ruling was made in the case of a boy ten years of age who was killed while trespassing on a railway line. In *Sherman v. H. & St. J. R. R.*,² Hough, J., quotes with approval the remark of Agnew, J., in *Flower v. P. R. R.*,³ that the youth of the person injured "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company."⁴

The fact of the intoxication of the injured person at the time of the injury will not only not relieve him from the legal consequences of his contributory negligence, but also, if his intoxicated state contributed to the happening of the injury, will be admissible in evidence as proof of contributory negligence.

76. The fact that the person injured was intoxicated at the time of the injury, will not relieve him from the legal consequences of his contributory negligence.⁵ Proof of the intoxication of the person injured at the time of the injury, is admissible in evidence for the defendant, if the intoxicated state of the person injured

¹ 11 Weekly Notes of Cases (Penna.) 310, 4 Am. & Eng. R. R. Cas. 569.

² 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589.

³ 69 Penna. St. 210.

⁴ See also *Snyder v. H. & St. J. R. R.*, 60 Mo. 413; *P. & R. R. R. v. Heil*, 5 Weekly Notes of Cases 91; *H. M. & F. P. Ry. v. Kelley*, 102 Penna. St. 115; *Flanders v. Meath*, 27 Ga. 358; *Roller v. S. S. R. R.*, Cal. , 19 Am. & Eng. R. R. Cas. 333; *Hogan v. C. M. & St. P. Ry.*, 59 Wisc. 139, 15 Am. & Eng. R. R. Cas. 439; *Maschek v. St. L. R. R.*, 71 Mo. 276, 2 Am. & Eng. R. R. Cas. 38; *C. & A. R. R. v. Becker*, 76 Ill. 25.

⁵ *Kean v. B. & O. R. R.*, 61 Md. 154, 19 Am. & Eng. R. R. Cas. 321; *T. P. & W. R. R. v. Riley*, 47 Ill. 514; *C. R. I. & P. R. R. v. Bell*, 70 Id. 102; *I. C. R. R. v. Hutchinson*, 47 Id. 408; *Weeks v. N. O. & C. R. R.*, 32 La. An. 615; *Milliman v. N. Y. C. & H. R. R. R.*, 66 N. Y. 642.

contributed to the happening of the injury.¹ Evidence is admissible to show that the plaintiff was an habitual drunkard, as bearing on the question of the compensatory damages to which he may be entitled.²

An incapacity on the part of the injured person will not render the railway liable to him under circumstances in which it would not be liable to a person of average capacity, unless that incapacity be known to the railway servants.

77. It has been stated that knowledge on the part of the railway of the injured person's incapacity, imposes upon the railway a higher measure of duty with regard to that person, but it is, nevertheless, clear, that the incapacity of the injured person, if not known to the railway servants, will not render the railway liable under circumstances in which it would not be liable to persons who are not so incapacitated. This rule has been applied in cases of deaf persons.³

78. It is also to be said that the incapacity of the person injured imposes on him the duty of exercising, for his own protection, that degree of care for his own safety that will, as far as possible, compensate for his impaired sense of hearing, or of sight, or other disability.⁴

¹ Herring *v.* W. & R. R. R., 10 Ired. 402; I. C. R. R. *v.* Hutchinson, 47 Ill. 408; Weeks *v.* N. O. & C. R. R., 32 La. An. 615; Davis *v.* O. & C. R. R., 8 Oreg. 172; S. W. R. R. *v.* Hankerson, 61 Ga. 114; H. & T. C. Ry. *v.* Waller, 56 Tex. 331, 8 Am. & Eng. R. R. Cas. 431.

² C. & P. R. R. *v.* Sutherland, 19 Ohio St. 151.

³ C. & C. R. R. *v.* Terry, 8 Ohio St. 570; Poole *v.* N. C. R. R., 8 Jones (N. C.) 340; I. C. R. R. *v.* Buckner, 28 Ill. 299; Johnson *v.* L. & N. R. R., Ky. , 13 Am. & Eng. R. R. Cas. 623.

⁴ Johnson *v.* L. & N. R. R., Ky. , 13 Am. & Eng. R. R. Cas. 623; C. & C. R. R. *v.* Terry, 8 Ohio St. 570; Zimmerman *v.* H. & St. J. R. R., 71 Mo. 476, 2 Am. & Eng. R. R. Cas. 191; Purl *v.* St. L., K. C. & N. Ry., 73 Mo. 168, 6 Am. & Eng. R. R. Cas. 27; C. & N. W. Ry. *v.* Miller, 46 Mich. 532, 6 Am. & Eng. R. R. Cas. 89; Laicher *v.* N. O., J. & S. R. R., 28 La. An. 320; Cogswell *v.* O. & C. R. R., 6 Oregon 417.

VIII. THE PLAINTIFF'S OWN CONTRIBUTORY NEGLIGENCE WHEN SUING FOR INJURIES TO THE PERSON OF ANOTHER.

The plaintiff's own contributory negligence will bar his recovery when he sues for damage to himself resulting from the personal injuries of some one else.

79. The plaintiff's own contributory negligence will bar his recovery, not only when he sues for his personal injuries, but also when he sues for the loss caused to him by personal injuries done to some one else, as when a husband, master, or parent sues for the loss of the services of an injured wife, servant, or child.¹ Thus, it has been held to be contributory negligence in a parent to knowingly allow an infant of less than four years of age to go at large in a city street without a protector;² or, a boy to serve the drivers of horse cars with water;³ or, a boy to ride upon the lead horse of a team at a railway crossing, the teamster retaining no control over that horse;⁴ or a boy to serve laborers on a construction train with water;⁵ or children to play upon a railway line.⁶

80. On the other hand, it has been held not to be necessarily contributory negligence in parents to permit a child of eighteen months of age to play in close

¹ *Glassey v. F. & P. Ry.*, 57 Penna. St. 172; *Smith v. H. M. & F. Ry.*, 92 Id. 450; *Cauley v. P. C. & St. L. Ry.*, 95 Id. 398; *P. R. R. v. Bock*, 93 Id. 427; *Roller v. S. S. R. R.*, Cal., 19 Am. & Eng. R. R. Cas. 333; *B. & I. R. R. v. Snyder*, 24 Ohio St. 670; *P. F. W. & C. R. R. v. Vining*, 27 Ind. 513.

² *Glassey v. F. & P. Ry.*, 57 Penna. St. 172.

³ *Smith v. H. M. & F. Ry.*, 92 Penna. St. 450.

⁴ *P. R. R. v. Bock*, 93 Penna. St. 427.

⁵ *O. & M. Ry. v. Hammersley*, 23 Ind. 371.

⁶ *Williams v. T. & P. Ry.*, 60 Tex. 205, 15 Am. & Eng. R. R. Cas. 403; *E. & C. R. R. v. Wolf*, 59 Ind. 89; *J. M. & I. R. R. v. Bowen*, 49 Ind. 154; *Albertson v. K. & D. M. R. R.*, 48 Iowa 292; *Ewen v. C. & N. W. Ry.*, 38 Wisc. 613; *Cauley v. P. C. & St. L. Ry.*, 95 Penna. St. 398, 98 Id. 498.

proximity to a railway line, under the guardianship of another child eight years of age;¹ or to send a boy nine years of age upon an errand which required him to walk upon a railway line;² or, to leave a child of tender years under the care of a boy thirteen years of age;³ or, under the care of a girl of eight years of age.⁴

81. It has been held that poor parents of infant children are not contributorily negligent if they do not prevent their infant children from straying into the public streets, or upon the lines of railways.⁵ The judgments in those cases seem to have been largely influenced by the sentimental reflections of the judges upon the poverty of the plaintiffs, and their consequent inability to employ servants to watch their children, and the hardship of requiring them to keep those children within doors when they could not go safely abroad; but those learned judges failed to give due weight to the consideration that the railway was not responsible for the acts of the parents in bringing the children into the world, nor for that degree of misfortune which retained those parents in a condition of more or less want, and that there is no rule of law, nor principle of justice, which compels railways to insure the public against the necessary incidents of poverty, nor which entitles people, either poor or rich, to make, at the expense of railways, profitable speculations out of the deaths of the children whom their own neglect of parental duty has exposed

¹ P. A. & M. Ry. v. Pearson, 72 Penna. St. 169.

² P. R. R. v. Lewis, 79 Penna. St. 33.

³ Dahl v. M. C. Ry., 62 Wisc. 652, 19 Am. & Eng. R. R. Cas. 121.

⁴ C. & A. R. R. v. Gregory, 58 Ill. 226.

⁵ P. A. & M. Ry. v. Pearson, 72 Penna. St. 169; P. & R. R. R. v. Long, 75 Id. 257; Penna. Co. v. James, 81 $\frac{1}{2}$ Id. 194; P. R. R. v. Lewis, 79 Id. 33; Hoppe v. C. M. & St. P. Ry., 61 Wisc. 357, 19 Am. & Eng. R. R. Cas. 74; Isabel v. H. & St. J. R. R., 60 Mo. 475; Walters v. C. R. I. & P. R. R., 41 Iowa 71; O'Flaherty v. U. R. R., 45 Mo. 70; Frick v. St. L., K. C. & N. R. R., 75 Mo. 542, 10 Am. & Eng. R. R. Cas. 776.

to peril. The cases of Pearson, Long, Lewis, and James are open to criticism in other respects. In Pearson's case the jury were permitted to find that a girl of eight years of age was a competent nurse for an infant permitted to play in proximity to a railway track, yet such a finding is clearly contrary to reason. In Long's, Lewis's, and James's cases, the injured infants were trespassers, and the defendant's owed no duty to them, and, *a fortiori*, none to the parents who took no care to prevent their children straying into danger. Judge Redfield, with his usual clearness, expresses sound views on this subject.¹

IX. THE ATTRIBUTION OF THE CARRIER'S NEGLIGENCE TO THE PASSENGER.

Where a passenger sues for injuries done by other than that passenger's carrier, negligence upon the part of that carrier is, in some jurisdictions, attributed to the passenger as contributory negligence upon his part, but, in other jurisdictions, this attribution of contributory negligence is not recognized.

82. The reason of the rule is, not that the servant of the passenger's carrier, who, by his negligence, has contributed to the accident, is *pro hac vice* the servant of the passenger, but that the carrier is so far the agent of the passenger that his negligence is the passenger's negligence, or, in other words, that the passenger, having entrusted his person to the carrier, and having been injured by the negligence of that carrier, combined with the negligence of a third party who was not under any contractual duty to him, cannot be permitted to recover from that third party for an injury which would not have happened if it had not been for negligence on the part of that carrier co-operating in bring-

¹ 2 Redf. Ry. Cas. 501.

ing the passenger into a position of danger. This rule of law is tacitly assumed, though not expressly stated, in *Bridge v. G. J. Ry.*,¹ for there the contributory negligence which was considered, was not the plaintiff's own negligence, but that of his carrier. In *Thorogood v. Bryan*,² the plaintiff sued to recover, under Lord Campbell's Act, for the death of her husband, who was negligently killed by the defendant's servant driving an omnibus, the decedent having been a passenger on another omnibus whose driver was negligent in not drawing up at the curb, and in permitting the decedent to alight on the street from his omnibus while in motion. At the trial Williams, J., directed the jury that "if they were of opinion that want of care on the part of the driver of his omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, their verdict must be for the defendant." The jury having found for the defendant, a rule for a new trial was discharged, Maule, J., saying, "if the deceased himself had been driving the case would have been free from doubt. So there could have been no doubt had the driver been employed to drive him and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of the contract he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. * * * If there is negligence on

¹ 3 M. & W. 244.

² 8 C. B. 115, 65 E. C. L.

the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say, that, although the defendant could not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he saw fit to trust."

83. In *Catlin v. Hills*,¹ the plaintiff, having been a passenger on the steamboat "Sons of the Thames," with which the defendant's boat "Sapphire" had collided, and having been injured by reason of the anchor of the Sons of the Thames having become dislodged in the collision and falling upon him, brought his action against the owners of the Sapphire. Cresswell, J., directed the jury that the plaintiff was not entitled to recover if they were of opinion that there had been negligence on the part of those entrusted with the conduct and management of the Sons of the Thames, but that they must dismiss from their minds all that had been said about the stowing of the anchor, for the plaintiff would be entitled to a verdict even though they should think that the anchor had been improperly left unfastened. The jury having found for the plaintiff, a rule for a new trial upon the ground of misdirection was argued, but before judgment was rendered the case was settled, it being stated in a note to the report that it was understood that the court would have discharged the rule. In *Armstrong v. L. & Y. Ry.*,² the L. & N. W. Ry. had statutory running powers over the defendant's line,

¹ 8 C. B. 123, 65 E. C. L.

² L. R. 10 Ex. 47.

and the plaintiff, an officer of the L. & N. W. company, was travelling on their pass and in their train over the defendant's line, and was injured by an accident caused by the concurring negligence of the two companies. It was held that the plaintiff was so far identified with the L. & N. W. Ry., not by his official position, but by reason of his being a passenger on its train, that he could not recover for negligence to which they had contributed. In *Child v. Hearn*,¹ the plaintiff, a plate layer in the service of the G. E. Ry., was moving on their line in a hand car when the defendant's pigs, having run through a fence which the railway had, under statutory obligations, constructed, and which was insufficiently constructed, upset the hand car and injured the plaintiff. It was held that the plaintiff by using the company's line for their purposes was identified with their negligence and could not recover from the defendant.² In Pennsylvania the doctrine seems to have been adopted to its full extent. In *Simpson v. Hand*,³ the plaintiffs, owners of goods shipped on the steamer Thorn, which was run into by the steamer William Henry and the goods destroyed, brought an action against the owners of the William Henry, who defended upon the ground that the collision was contributed to by the negligence of the master and crew of the Thorn. It was held that the negligence of the carrier's crew was attributable to the plaintiffs, and that they could not recover. In *Lockhart v. Lichtenthaler*,⁴ the plaintiff, a widow, sued to recover for the death of her husband, a brakeman upon coal cars which were run over the A. V. R. R. by locomotives of the company, the decedent having been

¹ L. R. 9 Ex. 176.

² See also Lord Blackburn's judgment in *Spaight v. Tedcastle*, 6 App. Cas. 217, and "The Bernina," 11 P. D. 31.

³ 6 Wharton 311.

⁴ 46 Penna. St. 151.

killed by a collision with some empty oil cars which the defendant had negligently placed near the railroad track, negligence upon the part of the A. V. R. R. having contributed to the accident. At the trial the judge instructed the jury to disregard the contributory negligence of the railroad, but judgment upon a verdict for the plaintiff was reversed in error, the Supreme Court holding that the contributory negligence of the carrier must be imputed to the decedent. In *P. & R. R. R. v. Boyer*,¹ the plaintiff sued to recover for the death of her husband, a passenger in a car of a street railway, who was killed in a collision of his car with the defendant's train. Judgment upon a verdict for the plaintiff was reversed in error because the judge at the trial took away from the jury the question of the contributory negligence upon the part of the driver of the street car.

84. There are, however, some English cases which do not, at first sight, seem to be reconcilable with the preceding cases. In *Rigby v. Hewitt*,² the plaintiff, having been a passenger in an omnibus, brought suit against the owners of another omnibus which, while both omnibuses were driving at great speed, collided with the omnibus in which the plaintiff was a passenger and threw him out. Rolfe, B., directed the jury that the plaintiff was not disentitled to recover merely because the omnibus in which he sat was driving at a furious rate of speed, and that if the jury thought the collision took place from the negligence of the driver of defendant's omnibus and that plaintiff's omnibus was not in fault, in not endeavoring to avoid the accident, then the defendant was liable. The jury having found for the plaintiff a new trial was moved for upon the ground of misdirection, but the rule was refused. In *Greenland v. Chaplin*,³ the facts were curiously identical with those

¹ 97 Penna. St. 91.

² 5 Ex. 240.

³ 5 Ex. 243.

in *Catlin v. Hills*. Pollock, C. B., directed the jury that if they were of the opinion that the collision was owing to bad navigation of the defendant's steamboat, they should find for the plaintiff, and if they thought there was any negligence either in the stowage of the anchor or on the part of the plaintiff in putting himself in the place where he was on board his steamboat they should find for the defendant. The jury having found for the plaintiff a rule for a new trial was discharged. Pollock, C. B., after commenting on the finding of the jury which had negatived negligence on the part of the plaintiff's carrier, added, "On consideration I am of opinion that the law, as laid down by me in this respect, was not correct. I entirely concur with the rest of the court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say — 'Part of that mischief would not have arisen, if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action. And certainly I am not aware that according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party." Yet these cases are not really authorities against the rule, for in each case the findings of the jury negatived negligence on the part of the plaintiff's carrier, and the dicta of the judges obviously had reference, not to the liability of the passenger for the negligence of his carrier, in general, but to his liability for that negligence upon the part of the carrier which was too remote to be considered a proximate cause of the injury. In *Mann v. Wieand*,¹ where a widow sued to

¹ 4 Weekly Notes of Cases (Penn.) 6.

recover for injuries resulting in the death of her husband, the defendant's vicious dog having frightened the horses drawing a wagon in which the decedent had been invited to drive and was being carried, judgment upon a verdict for the plaintiff was reversed on other grounds, but in his judgment Mercur, C. J., said: "the husband had no control or authority over the driver; nor did the driver control the personal conduct of the husband. He, therefore, was not liable for the negligent conduct of the driver. * * * Negligence in a general sense would not protect the defendant from liability for a direct and proximate injury caused by his own negligence." Judgment upon a verdict for the plaintiff was reversed in error upon other grounds, and the remarks of the learned Chief Justice upon this subject must be regarded as *obiter dicta*, which are not to be reconciled with the judgments of his court in the earlier case of *Lockhart v. Lichtenhaler*, or the later case of *P. & R. R. R. v. Boyer*, in whose decision he participated. In England the rule has been criticised by the learned editor of Smith's Leading Cases,¹ by Williams, J., in the course of the argument in *Tuff v. Warman*,² and by the same judge again in *Waite v. N. E. Ry.*,³ and by Dr. Lushington in *The Milan*,⁴ but its re-affirmance in the cases which have been cited from the Law Reports would seem to show that in the opinions of English judges these criticisms are not well founded.

85. In *Little, Receiver, etc., v. Hackett*,⁵ where the facts were that the plaintiff, while being driven in a hired hack, was injured at a grade crossing by the concurring negligence of the railway and the hack driver, the judge at the trial directed the jury that the negligence of the hack driver was not to be attributed to the

¹ Vol. I, p. 366.

² 2 C. B. N. S. 740, 89 E. C. L.

³ El. Bl. & El. 729, 96 E. C. L.

⁴ 1 Lush. 388, 403.

⁵ 116 U.S. 366.

passenger, unless it should be found that the passenger supervised and controlled the action of the driver. The jury having found a verdict for the plaintiff, judgment thereon was affirmed by the Supreme Court of the United States upon a bill of exceptions to the direction of the judge at the trial. Field, J., in delivering judgment, said : "Cases cited from the English courts * * * and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, when no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by him. But neither of these conclusions can be maintained ; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver, or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant. Neither of them is the servant of the passenger ; and his asserted identity with them is contradicted by the daily experience of the world."

86. It may be suggested in reply to the line of argument so forcibly stated by Field, J., in the last cited case, that the reason of the rule is, as put by Maule, J., in

Thorogood *v.* Bryan,¹ that the passenger having voluntarily contracted with his carrier, and having thereby put himself under the control of that carrier and of that carrier's servants, must take upon himself the consequences to himself of that carrier's negligence. It is irrelevant to urge that it must be conceded that the carrier and the carrier's servant are not the servants of the passenger, and that the passenger is not responsible to third parties for injuries done to them by the negligence of the carrier, or of the carrier's servant; for the attribution to the passenger of the carrier's contributory negligence is based, not upon an assumption by the passenger of control over the carrier, but upon a submission by the passenger of his person to the control of the carrier. Despite the criticisms, therefore, of so many and so high authorities, I venture to believe that Thorogood *v.* Bryan was rightly decided, and that the rule, as maintained in England and in Pennsylvania, is founded upon correct principles of law.²

¹ 8 C. B. 115, 65 E. C. L., section 82.

² In opposition to the rule there can also be cited Colegrove *v.* N. Y. & N. H. R. R., 20 N. Y. 492; Bennett *v.* N. J. R. R., 36 N. J. Law 225; Tompkins *v.* Clay, St. H. R. R., Cal., 18 Am. & Eng. R. R. Cas. 144; Chapman *v.* N. H. R. R., 19 N. Y. 341; W. St. L. & P. Ry. *v.* Shacklet, 105 Ill. 364, 12 Am. & Eng. R. R. Cas. 166; Dyer *v.* Erie R. R., 71 N. Y. 228; Danville Turnpike Co. *v.* Stewart, 2 Metc. (Ky.) 119; L. R. R. *v.* Case, 9 Bush 728; Eaton *v.* B. & L. R. R., 11 Allen 500; Transfer Co. *v.* Kelly, 36 Ohio St. 86, 3 Am. & Eng. R. R. Cas. 335; Masterson *v.* N. Y. C. & H. R. R. R., 84 N. Y. 247, 3 Am. & Eng. R. R. Cas. 408; Robinson *v.* N. Y. C. & H. R. R. R., 66 Id. 11; Malmsten *v.* M. H. & O. R. R., 49 Mich. 94, 8 Am. & Eng. R. R. Cas. 291; N. Y., L. E. & W. R. R. *v.* Steinbrenner, 47 N. J. L. 161; Perry *v.* Lansing, 17 Hun 34; Busch *v.* B. C. R. R., 29 Hun 112; Gray *v.* P. & R. R. R. (U. S. C. C. N. D. N. Y.), 22 Am. & Eng. R. R. Cas. 351; Webster *v.* H. R. R., 38 N. Y. 260; P., C. & St. L. R. R. *v.* Spencer, 98 Ind. 186, 21 Am. & Eng. R. R. Cas. 478. For the rule there can be cited, Thorogood *v.* Bryan, 8 C. B. 115, 65 E. C. L.; Bridge *v.* G. J. Ry., 3 M. & W. 244; Catlin *v.* Hills, 8 C. B. 123, 65 E. C. L.; Armstrong *v.* L. & Y. Ry., L. R. 10 Ex. 47; Child *v.* Hearn, L. R. 9 Ex. 176; "The Bernina," 11 P. D. 31; Simpson *v.* Hand, 6 Wh. 311; Lockhart *v.* Lichtenthaler, 46 Penna. St. 151; P. & R. R. R. *v.* Boyer, 97 Id. 91; Smith *v.* Smith, 2 Pick. 621; C. & C. R. R. *v.* Terry, 8 Ohio St. 570; Puterbaugh *v.* Reasor, 9 Id. 484;

87. Upon the same principle it has been held that where a wife is injured by collision with a train, while travelling in a vehicle driven by her husband, his contributory negligence bars her recovery.¹ So, where a master sues for injury done to his property, while under the care of a servant, the contributory negligence of that servant will bar a recovery by the master.²

X. THE ATTRIBUTION OF THE NEGLIGENCE OF THE DECEDENT TO THOSE WHO SUE FOR DAMAGES FOR HIS DEATH.

The contributory negligence of a person who has been killed will bar a recovery by those who sue for damages for his death.

88. Contributory negligence on the part of the person killed, will be a defence to an action by the parties entitled to recover for his death. The limitation in Lord Campbell's Act of the right to recover to such cases only "as would, if death had not ensued, have entitled the party to maintain an action to recover damages in respect thereof," has been construed by the Queen's Bench in *Pym v. G. N. Ry.*,³ to have "reference, not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of," and Cockburn, C. J., added,

Bryan v. N. Y. C. R. R., 31 Barb. 335; *Nicholls v. G. W. Ry.*, 27 Up. Can. (Q. B.) 382; *Payne v. C. R. I. & P. Ry.*, 39 Iowa 523; *Mooney v. H. R. R. R.*, 5 Robertson (N. Y.) 548; *L. S. & M. S. Ry. v. Miller*, 25 Mich. 274. The rule has obviously no application to the case of a passenger, who, having been landed by a steamboat company upon a railway pier is run over on the pier by a train negligently handled by the railway company, there being no concurring negligence on the part of the steamboat company. *Malmsten v. M. H. & O. R. R.*, 49 Mich. 94, 8 Am. & Eng. R. R. Cas. 291.

¹ *Carlisle v. Sheldon*, 38 Vt. 440; *Peck v. N. Y., N. H. & H. R. R.*, 50 Conn. 379, 14 Am. & Eng. R. R. Cas. 633.

² *T. & W. R. R. v. Goddard*, 25 Ind. 185.

³ 2 B. & S. 759, 110 E. C. L.

"thus, if the deceased had by his own negligence materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendant, the present action could not have been supported." So, Denman, C. J., in *Tucker v. Chaplin*,¹ in an action under Lord Campbell's Act, directed the jury, that "the rules in actions brought under this statute by representatives, are the same as in actions brought by the injured parties themselves; therefore, if the deceased, by his conduct, leads to the accident, an action under the statute does not lie."²

XI. THE NEGLIGENCE OF A CONTRACTING PARTY AS ATTRIBUTED TO THE PERSON ON WHOSE BEHALF THE CONTRACT WAS MADE.

Where the action is brought to recover damages for a tort founded upon a contract, the contributory negligence of the contracting party will bar a recovery by the person upon whose behalf the contract was made.

89. Where the suit is brought, not for a pure tort, but for a tort founded upon contract, contributory negligence upon the part of the contracting party will bar a recovery by the injured person on whose behalf the contract was made. Thus, in *Waite v. N. E. Ry.*,³ the plaintiff, an infant of five, had been taken by its grandmother to the defendant's station, where she had bought tickets for the child and herself. Having to cross the line in order to get to the platform at which the train

¹ 2 C. & K. N. P. 730, 61 E. C. L.

² See, also, *Witherley v. Regents' Canal Co.*, 12 C. B. N. S. 2, 104 E. C. L.; *Lofton v. Vogles*, 17 Ind. 105; *Rowland v. Cannon*, 35 Ga. 105; *Gerety v. P., W. & B. R. R.*, 81 Penna. St. 274; *Karle v. K. C., St. J. & C. B. R. R.*, 55 Mo. 476; *Dewey v. C. & N. W. Ry.*, 31 Iowa 373; *Kelly v. Hendrie*, 26 Mich. 255.

³ El. Bl. & El., 719, 96 E. C. L.

was to stop, the grandmother and child, in crossing the line, were run over and the child hurt. The jury having found specially that the defendants and the plaintiff's grandmother were negligent, on these findings Martin, B., entered the verdict for the plaintiffs, with leave to the defendants to move for a nonsuit or the entry of a judgment for them. After argument the rule was made absolute. Campbell, C. J., said: "The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent; but we think that the defendants, in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability toward the grandchild than toward the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild. * * * At all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms." A writ of error having been taken to the Exchequer Chamber, the judgment was affirmed. Cockburn, C. J., said: "I put the case on this ground, that, when a child of such tender years and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." Pollock, C. B., said: "There really is no difference between the case of a person of tender years under the care of another, and a valuable chattel committed to the care of an individual, or even not com-

mitted to such care. The action cannot be maintained unless it can be maintained by the person having the apparent possession, even though the grandchild or the chattel was not regularly put into the possession of the person, as, for instance, though the party taking charge of the child had done so without the father's consent; that circumstance would make no difference as to the question of the child's right." Bramwell, B., said: "In form the action is for a wrong; but it is, in fact, for a breach of duty created by contract. It is alleged that the plaintiff was lawfully on the railway. That could be so only on the supposition that he had become a passenger through the instrumentality of himself or another. There must be a contract or duty. It is impossible to say that the company contracted any other duty toward the infant, thus accompanied, than they would have contracted toward an adult, or that they were responsible for what would have occasioned no mischief but for the negligence of a person having the custody of the plaintiff."

XII. THE ATTRIBUTION TO INFANTS OF THE CONTRIBUTORY NEGLIGENCE OF PARENTS AND GUARDIANS.

Where the injured person is an infant of tender years, and the ground of the action is a pure tort, it is for the jury and not for the court to determine whether or not the contributory negligence of the parents or guardians of the infant in permitting him or her to be at large is such as to bar the infant's recovery.

90. There are many authorities for the proposition that where an injured infant is the plaintiff, and the cause of action is a pure tort, contributory negligence on the part of the parents or guardians of the infant plaintiff in permitting him or her to roam at large will not bar the plaintiff's recovery. The question does not seem to have been ruled in England. In *Lynch v.*

Nurdin,¹ which is often cited in support of this proposition, the question was not raised, although in the case of *Lygo v. Newbold*,² Lynch *v. Nurdin* having been cited, Alderson, B., misapprehending that case, said, "the negligence, in truth, is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury;" but Pollock, C. B., obviously replying to Alderson, B., put *Lynch v. Nurdin* on the correct ground, that "the plaintiff, being a child of tender years, could not be considered as causing any part of the injury it had sustained, but that the mischief was occasioned solely by the defendant's default."³

91. Cowen, J., in *Hartfield v. Roper*,⁴ where the plaintiff, a child of two years of age, had sued to recover for injuries received by being run over while straying on a highway, puts the ground of his judgment against the plaintiff thus: "an infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in re-

¹ 1 Q. B. 29, 41 E. C. L.

² 8 Ex. 302.

³ In support of the proposition there can also be cited: *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardiner*, 19 Conn. 507; *Kay v. P. R. R.*, 65 Penna. St. 269; *G. St. R. R. v. Hanlon*, 53 Ala. 70; *B. & I. R. R. v. Snyder*, 18 Ohio St. 399; *N. & P. R. R. v. Ormsby*, 27 Gratt. 455; *Frick v. St. L., K. C. & N. Ry.*, 75 Mo. 542; *C. H. & H. Ry. v. Moore*, 59 Tex. 64, 10 Am. & Eng. R. R. Cas. 745; *Daley v. N. & W. R. R.*, 26 Conn. 591; *McGeary v. E. R. R.*, 135 Mass. 363, 15 Am. & Eng. R. R. Cas. 407; *Smith v. A., T. & S. F. R. R.*, 25 Kans. 738, 4 Am. & Eng. R. R. Cas. 554; *St. L., I. M. & S. Ry. v. Freeman*, 36 Ark. 41, 4 Am. & Eng. R. R. Cas. 608. Against the proposition there can be cited: *Hartfield v. Roper*, 21 Wend. 615; *Mangam v. B. C. R. R.*, 38 N. Y. 456; *Holly v. Boston Gas Light Co.*, 8 Gray 123; *Brown v. E. & N. A. R. R.*, 58 Me. 384; *Fitzgerald v. St. P., M. & M. Ry.*, 29 Minn. 336, 8 Am. & Eng. R. R. Cas. 310; *L. & I. Ry. v. Huffmann*, 28 Ind. 287; *T., W. & W. Ry. v. Grabel*, 88 Ill. 441; *Meeks v. S. P. Ry.*, 52 Cal. 602.

⁴ 21 Wend. 615.

spect to third persons his act must be deemed that of the infant, his neglect, the infant's neglect. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."

92. On the other hand in *Kay v. P. R. R.*,¹ where the plaintiff, nineteen months of age, sued to recover for injuries caused by being run over by defendant's cars upon a siding on an open lot, of which lot defendant was in possession. The plaintiff lived with her parents in a shanty on the lot, and the defendant had permitted the public to make use of the ground. The injury was caused by detaching a lumber car and sending it around a curve on a down grade unattended by a brakeman. The jury found for the plaintiff, but upon a point reserved, the court below entered judgment for the defendant *non obstante veredicto*, which was reversed in error upon the ground that the defendant having licensed the public use of the lot it was for the jury to say whether they had been negligent in moving their cars under the circumstances, and also that the negligence of the parents, if any, in permitting the child to stray from the house could not be imputed to the child, Agnew, J., saying: "The doctrine which imputes the negligence of the parent to the child in such a case as this is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian had placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child

¹ 65 Penna. St. 269.

into the cars, and by his neglect suffers it to be injured by straying off upon the platform. But here a mother toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it—then why should the wrong not be compensated?"

93. In order to justly estimate the relative weight and value of these conflicting authorities, it must be remembered that the precise question, is, whether or not, when an infant has been injured by the negligence of a railway, that is, by a failure on the part of the railway to perform some specific duty which, under the particular circumstances of the case, it owed to the infant, the plaintiff's recovery is to be barred by the antecedent failure of his or her parents or guardians to perform that general duty of protection which they owe to the infant. The question, therefore, does not arise until negligence on the part of the railway has been proven, but when that has been proven, the antecedent negligence on the part of the infant's parents or guardians does not constitute, in justice, a defence to the railway, for if the railway can say to the infant, "you would not have been injured by my negligence, if your parents or guardians had not been negligent in permitting you to stray on the highway," the infant can reply, "it is true they neglected their duty, but notwithstanding that neglect I would not have been hurt if you had not failed to do your duty to me." The necessary allegations of the injured infant and the railway being thus stated, it

would seem that the negligence on the part of the infant's parents or guardians is a remote and not a proximate cause of the injury, and that, for that reason, that negligence is not in any proper sense contributory negligence. This line of reasoning renders it unnecessary to invoke the humanitarian and sentimental considerations upon which Agnew, J., dwells in *Kay v. P. R. R.*, and the intrusion of which into the judgments of courts so often furnishes illustrations of the maxim "hard cases make bad law." Dr. Wharton¹ assumes that in England the law is as laid down in *Hartsfield v. Roper*. The question has, as I have stated, never been raised in England. Neither *Lynch v. Nurdin*,² *Singleton v. E. C. Ry.*,³ *Mangan v. Atterton*,⁴ nor *Waite v. N. E. Ry.*,⁵ touch the question. When it does come to be considered in England, the application of the doctrine of Davies *v. Mann* will necessarily lead to the conclusion that as the injury could have been, notwithstanding the negligence of the infant's parents or guardians, avoided by the exercise of reasonable care on the part of the railway, the negligence of the parents or guardians will not bar the plaintiff's recovery. The carefully guarded judgments in *Waite v. N. E. Ry.*, show that that case rests on the contractual relation between the parties and furnishes no authority for an action grounded on a pure tort.

94. Of course, where a parent personally conducts a child into a position of danger, the parent's contributory negligence will be attributed to the child; as, for instance, where a child of tender years is injured while trespassing upon a railway line in company with its mother.⁶

¹ Law of Negligence, sec. 311.

² 1 Q. B. 29, 41 E. C. L.

³ 7 C. B. N. S. 287, 97 E. C. L.

⁴ L. R. 1 Ex. 239.

⁵ El. Bl. & El. 719, 96 E. C. L.

⁶ *Grethen v. C. M. & St. P. Ry.* (U. S. C. C. District of Minnesota), 19 Am. & Eng. R. R. Cas. 342.

XIII. THE ATTRIBUTION OF THE CONTRIBUTORY NEGLIGENCE OF STRANGERS.

The contributory negligence of third persons, unconnected with the plaintiff or the person injured, will not bar the plaintiff's recovery.

95. The contributory negligence of persons unconnected with the plaintiff will not be imputed to the plaintiff as contributory negligence. Thus in *N. P. R. R. v. Mahoney*,¹ the plaintiff, a child of four years of age, while playing near the defendant's line, having been picked up by an aunt to whom her parents had not delegated her care and custody, was injured by the railway's negligence concurring with that of the aunt who was carrying her across the line; and it was held that the negligence of the aunt could not be imputed as contributory negligence to the plaintiff. In *P. A. & M. P. Ry. v. Caldwell*,² a similar ruling was made where an infant was injured by negligence on the part of the railway, concurring with the negligence of another infant who was a companion of the plaintiff, but not in charge of her.³

¹ 57 Penna. St. 187.

² 74 Penna. St. 421.

³ See also *Eaton v. B. & L. R. R.*, 11 Allen 500; *Scott v. Shepherd*, 2 W. Bl. 892; *Dixon v. Bell*, 5 M. & S. 198, Stark 287, 2 E. C. L.; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L.; *Hughes v. Macfie*, 2 H. & C. 744; *Hill v. New River Co.*, 9 B. & S. 303; *Burrows v. March G. & C. Co.*, L. R. 5 Ex. 66, 7 Id. 96; *Collins v. Middle Level Commrs.*, L. R. 4 C. P. 279; *Harrison v. G. N. Ry.*, 3 H. & C. 321; *Watling v. Oastler*, L. R. 6 Ex. 73; *Daniels v. Potter*, 4 C. & P. 262, 19 E. C. L.; *Clark v. Chambers*, L. R., 3 Q. B. D. 327, criticising *Mangan v. Atterton*, L. R. 1 Ex. 239.

BOOK II.

THE PERSONS FOR WHOSE ACTS OR OMISSIONS THE RAILWAY IS LIABLE.

CHAPTER I.

THE GENERAL NATURE OF THE RAILWAY'S RESPONSIBILITY FOR OTHERS.

- I. The liability as affected by the character of the act, as one of omission or of commission.
 - II. Special and general agency.
 - III. Classification of the persons for whose acts railways are liable.
- I. THE LIABILITY AS AFFECTED BY THE CHARACTER OF THE ACT, AS ONE OF OMISSION OR OF COMMISSION.

Where the injury is done by the omission of a particular act of care which the duty of the railway to the person injured requires it to do for his protection, the fact of the omission fixes the liability of railway; and the relation between the railway and the person who has omitted to perform the duty is immaterial; but where the injury is done by an act of commission, the liability of the railway depends upon the fact of the relation of agency between the railway and the actual wrongdoer.

96. To render a railway liable for an injury in the course of its operations to the person of one who is himself without fault, it must necessarily be proven that the injury resulted from either the omission of some particular act of care, or the commission of some particular act of carelessness or of wilful wrongdoing, or the negligent performance of some rightful act by the railway, or by some person for whose act causing the injury the railway is legally responsible.

97. Of course, where the injury is done by an act, the actual wrongdoer is *civiliter* responsible to the person injured ; but the legal liability of the railway for the injury is dependent upon the positive or negative character of the act which causes the injury, and upon the relation of the wrongdoer to the railway. Where the injury is done by the omission of a particular act of care, which the duty of the railway to the person injured requires it to do for his protection, the fact of the omission fixes the liability of the railway ; and the relation between the railway and the individual who has omitted to perform the duty is immaterial ; for, as Blackburn, J., has said,¹ “the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done, and *** it is quite immaterial whether the actual actors are servants or not.” Upon the same principle, a railway is liable for an independent contractor’s non-performance of a duty whose performance was incumbent upon his employer, the railway.² On the other hand, where the injury is done by an act of commission, as the railway is an artificial person and can act only by its agents or servants, its liability must depend upon the fact of the relation of agency between the railway and the actual wrongdoer, for, as Rolfe, B., has said,³ “the liability of any one, other than the party actually guilty of a wrongful act, proceeds on the maxim ‘*qui facit per alium facit per se.*’”⁴

¹ *The Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 115.

² *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L.; *Bower v. Peate*, 1 Q. B. D. 326.

³ *Reedie v. L. & N. W. Ry.*, *Hobbit v. Same*, 4 Ex. 243.

⁴ See, also, the judgment of Lord Cranworth in *Bartonhill Coal Co. v. Reid* 3 Macq. H. L. 282.

II. SPECIAL AND GENERAL AGENCY.

The relation between the railway and the actual wrongdoer may be either a special agency, or that general agency which the law characterizes as that of master and servant.

98. In the case of a special agency the railway can be made liable only by proof of a delegation of authority to do the particular act which is the cause of the injury, or by a subsequent ratification of its performance. Where the act is committed by a servant, the liability of the railway is fixed if the act be within the scope of, and be done in the exercise of, the servant's delegated authority.

**III. CLASSIFICATION OF THE PERSONS FOR WHOSE ACTS
RAILWAYS ARE LIABLE.**

99. The persons for whose acts causing injury railways are liable, may be classified as follows :

1. Servants of the railway, including under that term all of the railway's officers and employés of every grade.
2. Independent contractors.
3. Other corporations and individuals, including connecting railways, owners of cars run over the line, lessee railways, etc.

CHAPTER II.

THE LIABILITY OF RAILWAYS FOR THE ACTS OF THEIR
SERVANTS.

- I. The general nature of a master's liability for the acts of a servant.
- II. The relation of master and servant must in fact exist.
- III. The act must be within the scope of the servant's employment.
- IV. If the relation exists, and if the act be within the scope of the employment, it is not material that the master did not order the particular act.
- V. The liability of the railway for its servants' trespasses.
- VI. The liability of the railway for its servants' wilful acts.

I. THE GENERAL NATURE OF A MASTER'S LIABILITY
FOR THE ACTS OF A SERVANT.

The maxim "respondeat superior" means that a railway, like other masters, is civiliter responsible for the acts of its servants if the particular act causing the injury be within the scope of, and be done in the exercise of, the servant's delegated authority.

100. The general rule is that a railway, like other masters, is legally responsible for an injury done by an act of its servant if the particular act be within the scope of, and be done in the exercise of, the servant's delegated authority.¹

¹ Bartonhill Coal Co. v. Reid, 3 Macq. H. L. 266, 4 Jur. N. S. 767; Randleson v. Murray, 8 A. & E. 109, 35 E. C. L.; Yarborough v. Bank of England, 16 East. 6; Whitfield v. S. E. Ry., 1 El. Bl. & El. 115, 96 E. C. L.; Limpus v. London Genl. Omnibus Co., 1 H. & C. 526; Green v. Same, 7 C. B. N. S. 290, 97 E. C. L.; Seymour v. Greenwood, 6 H. & N. 359; Lawson v. The Bank of London, 18 C. B. 84, 86 E. C. L.; E. C. Ry. v. Broom, 6 Ex. 314; Chilton v. L. & C. Ry., 16 M. & W. 212; Smith v. B. & S. Gas Light Co., 1 Ad. & El. 526, 28 E. C. L.; Patten v. Rea, 2 C. B. N. S. 606, 89 E. C. L.; Goodman v. Kennell, 3 C. & P. 167, 14 E. C. L.; Page v. Defries, 7 B. & S. 137; Shaw v. Reed, 9 W. & S. 72; N. Y. & W. Tel. Co. v. Dryburgh, 35 Penna. St. 298; P. & R. R. R. v. Derby, 14 How. 469.

101. The reason of the rule is nowhere more clearly explained than by Lord Cranworth,¹ who said: "Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make that other person responsible. In general, it is sufficient for the purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim '*respondeat superior*' prevails, and the master is responsible. Thus, if a servant driving his master's carriage along the highway carelessly runs over a bystander, or, if a game-keeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or, if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold and so hurts a passer-by; in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master: *Qui facit per alium facit per se*. If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself,

¹ Bartonhill Coal Co. v. Reid, 3 Macq. H. L. 282.

or of those acting under his orders, in the course of his business. Third persons cannot, or, at all events, may not, know whether the particular injury complained of was the act of the master or the act of the servant. A person sustaining injury in any of the modes I have suggested has a right to say: ‘I was no party to your carriage being driven along the road, to your shooting near the public highway, and to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence.’ A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom, or by whose orders, these risks are incurred, responsible to third persons for any ill consequences resulting from want of due skill or caution.” The reason of the rule, therefore, is, that the master who has made choice of an incompetent or careless servant ought, in justice, to indemnify those who are not parties to the contract of service, and who have been injured in the course of the servant’s action in the exercise of the authority delegated to him by his master.

II. THE RELATION OF MASTER AND SERVANT MUST IN FACT EXIST.

The rule does not apply to cases where the railway does not stand in the character of employer to the person by whose act the injury has been occasioned.

102. In order to render the railway liable for the act of a servant, it must be shown that the relation of

master and servant in fact exists.¹ The railway is, therefore, not liable if it does not stand in the character of employer to the party by whose act the injury has been occasioned.² Thus, a railway is not liable for injuries caused to a person while at work on a station platform by the negligent act of a postal agent, transported under contract with the Post-Office Department, in throwing a mail bag from the mail car of a passing train, it being proven that it was the usage of business for the mail bag to be thrown off at a point some two hundred feet away from the station, and that the railway had, therefore, no reason to anticipate that the mail bag would be thrown on the station platform.³ In other cases,⁴ the railway was held liable to passengers who, while waiting for a train on a station platform, were injured by mail bags thrown by postal agents, it being proven that the railway had reason to know that mail bags were habitually thrown upon that platform from passing trains, and the railway being bound to guard its passengers against such injuries, whomsoever might be the person whose act caused the injury. These

¹ *Mitchell v. Crassweller*, 13 C. B. 237, 76 E. C. L.; *Joel v. Morison*, 6 C. & P. 501, 25 E. C. L.; *Sleath v. Wilson*, 9 C. & P. 607, 38 E. C. L.; *Lamb v. Palk*, Id. 629; *Bard v. Yohn*, 26 Penna. St. 482; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; *Burns v. Poulson*, L. R. 8 C. P. 563; *Venables v. Smith*, 2 Q. B. D. 279; *Lyons v. Martin*, 8 A. & E. 502, 35 E. C. L.; *McKenzie v. McLeod*, 10 B. 385, 25 E. C. L.; *Williams v. Jones*, 3 H. & C. 602; *Coleman v. Riches*, 16 C. B. 104, 81 E. C. L.; *Stevens v. Woodward*, 6 Q. B. D. 318.

² *Laugher v. Pointer*, 5 B. & C. 547, 12 E. C. L.; *Quarman v. Bennett*, 6 M. & W. 499; *Hughes v. Boyer*, 9 Watts 556; *Reedie v. L. & N. W. Ry.*, *Hobbit v. Same*, 4 Ex. 243; *Milligan v. Wedge*, 12 A. & E. 737, 40 E. C. L.; *Rapson v. Cubitt*, 9 M. & W. 710; *Lucas v. Mason*, L. R. 10 Ex. 251; *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Stevens v. Armstrong*, 2 Selden 435; *McCullough v. Shoneman*, 14 Weekly Notes of Cases 395; *Hemingway v. McCullough*, 15 Id. 328.

³ *Muster v. C. M. & St. P. Ry.*, 61 Wise. 325, 18 Am. & Eng. R. R. Cas. 113.

⁴ *Snow v. F. R. R.*, 136 Mass. 552, 18 Am. & Eng. R. R. Cas. 161; *Carpenter v. B. & A. R. R.*, 97 N. Y. 494, 21 Am. & Eng. R. R. Cas. 331.

cases agree, not only in holding the postal agents not to be servants of the railway, but also in treating as the test of the railway's liability its failure to guard those who are lawfully upon its station platform against dangers which may reasonably be regarded as likely to occur.

103. Nor is a railway liable for the acts of a volunteer assisting its servants, as, for instance, for the negligence of passengers in assisting other passengers to alight;¹ nor for advice given by passengers to another passenger to leap from a moving train;² or to leave a train at a place other than a station;³ nor is the railway to be held liable for the negligent act of a person engaged as his assistant by a servant to whom the railway has not delegated the power of employing an assistant.⁴ Whether or not the person causing the injury be a servant of the railway is, of course, a question of fact for the jury.⁵

104. The test of the existence of the relation of master and servant is to be found not in the payment of the servant's wages by the railway, but in the exercise by the railway of authority in appointing the servant, in directing his acts, in receiving the benefit of those acts, and in reserving the power of dismissing the servant.⁶

¹ *Burrows v. Erie Ry.*, 63 N.Y. 556; *Morrison v. Erie Ry.*, 56 Id. 302; *O. & N. Ry. v. Stratton*, 78 Ill. 88.

² *Filer v. N. Y. C. & H. R. R.*, 59 N.Y. 351.

³ *Frost v. G. T. R. R.*, 10 Allen 387; *C. & I. R. R. v. Farrell*, 31 Ind. 408.

⁴ *Jewell v. G. T. Ry.*, 55 N.H. 84.

⁵ *P. R. R. v. Spicker*, 105 Penna. St. 142.

⁶ *Laugher v. Pointer*, 5 B. & C. 547, 12 E. C. L.; *Quarman v. Bennett*, 6 M. & W. 499; *Purnell v. G. W. Ry.*, mentioned by Melish, L.J., in 2 C.P.D. 210; *Holmes v. Onion*, 2 C.B.N.S. 790, 89 E.C.L.; *Fenton v. City of Dublin Steam Packet Co.*, 8 A. & E. 835, 35 E.C.L.; *Dalyell v. Tyrer*, El. Bl. & El. 890, 96 E.C.L., 23 L.J.Q.B. 25; *Jones v. Mayor, etc., of Liverpool*, 14 Q.B.D. 890; *Fletcher v. Braddick*, 5 Bos. & Pul. 182; *Sproul v. Hemmingway*, 14 Pick. 1; *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205; *Little v. Hacket*, 116 U.S. 366.

III. THE ACT MUST BE WITHIN THE SCOPE OF THE SERVANT'S EMPLOYMENT.

In order to render the railway liable for the act of a servant, it must also be shown that the particular act which caused the injury was within the scope of the servant's employment.

105. Where the relation of master and servant exists between the railway and the person whose act is the cause of injury to another person, the railway is not liable if the servant in causing the injury is not acting within the scope of his employment. Thus,¹ a tenant in possession of a house was held not to be liable to the owner of the house for the act of a servant who, being employed to light a fire in a fire-place, undertook to clean the chimney by burning it out, and in so doing set fire to the house. So one,² to whom another had loaned his shed, in order that a sign-board might be made therein, was held in the Exchequer Chamber not to be liable for the act of a carpenter, who, while engaged in making the sign-board, lit his pipe and dropped the match, thereby setting fire to and burning the shed. This doctrine is also illustrated by the cases of injury done by servants who, entrusted with their employers' horses for the doing of errands, turn aside to accomplish some purpose of their own, and while accomplishing that injure some one else. The test in cases of this class is that put by Maule, J.,³ who says, "the master is liable, even though the servant, in the performance of the duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner; but when the servant, instead of doing that which he is employed to do, does something which he is not employed to do at

¹ *McKenzie v. McLeod*, 10 B. & C. 385, 25 E. C. L.

² *Williams v. Jones*, 3 H. & C. 602.

³ *Mitchell v. Crassweller*, 13 C. B. 237, 76 E. C. L.

all, then the master cannot be said to do it by his servant, and therefore he is not responsible for the negligence of the servant in doing it." Upon this principle, a sleeping-car company was held not to be liable for injuries caused to one standing on a station platform, by the act of the porter of a sleeping-car in throwing, for his personal convenience, a bundle of soiled clothes from a moving car.¹

106. But the fact that a railway servant has for a considerable length of time performed a certain duty is evidence to go to the jury that in so doing he was acting by the express or implied assent of the railway, thus,² a flagman, not employed by the railway to watch a main line crossing, but accustomed to warn persons about to cross the main line, having invited the plaintiff to cross when the line was not clear, and the plaintiff having been injured, it was held that "the fact that he had uniformly performed such duty for several years was competent evidence to be submitted to the jury as tending to prove that he was so acting by the express or implied assent of the railway."

IV. IT IS NOT MATERIAL THAT THE MASTER DID NOT ORDER THE PARTICULAR ACT.

Where the relation of master and servant exists, and where the act causing the injury is within the scope of the servant's employment, it is not material that the master did not order or even know of the doing of the particular act, or that in doing the act, or in the manner of its performance, the servant disobeyed the express injunctions of the master.

107. If the relation of master and servant exist, and if the act causing the injury be within the scope of the ser-

¹ Walton v. N. Y. C. S. C. Co., 139 Mass. 556, 21 Am. & Eng. R. R. Cas. 600, note.

² Peck v. M. C. Ry., Mich., 19 Am. & Eng. R. R. Cas. 257.

vant's employment, it is not material that the master did not order or even know of the doing of the particular act.¹ This view is clearly stated by Willes, J., in a case² where a bank was held liable for a fraudulent misrepresentation made by its cashier in the course of business. That learned judge said : "the general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, although no express command or privity of the master be proved," and after referring to specific instances, he adds: "in all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

V. THE LIABILITY OF THE RAILWAY FOR ITS SERVANTS' TRESPASSES IN THE EXERCISE OF THE AUTHORITY DELEGATED TO THEM.

108. Nor will the railway escape liability, if in doing the act or in the manner of its performance, the servant disobey the express injunctions of his superior officers, provided that the act be of that class with whose performance the servant is charged. Thus, in³ a case which Pigott, B., has characterized as "very near the line," a railway was held liable for the act of its porter in pulling the plaintiff out of a railway carriage about to start, because he believed the plaintiff was in a wrong car-

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Huzzey v. Field*, 2 C. M. & R. 432; *The Thetis*, L. R. 2 Ad. & Ec. 365; *Johnson v. C. V. R. R.*, 56 Vt. 707.

² *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 265.

³ *Bayley v. M. S. & L. Ry.*, L. R. 7 C. P. 415, 8 Id. 148.

riage, although the plaintiff was, in fact, in his right carriage, it being proven that while the rules of the company required the porters to prevent passengers from going by wrong trains, they did not expressly direct them to remove a passenger from a carriage. So¹ a railway has been held liable for the act of a brakeman in removing a passenger from a car reserved for ladies, it being the duty of the brakeman to notify the passenger that the car was reserved. So² a railway has been held liable for the death of a passenger resulting from his wrongful and forcible removal from a car by its conductor. So³ a railway has been held liable for its engine-driver's negligent blowing of a whistle in disobedience of the railway's regulations.

Where the particular act is done in furtherance of the general purpose of the railway, and is within the scope of the servant's authority, the railway is liable, even though the act be a trespass.

109. Where the particular act is done in furtherance of the general purposes of the railway, and is within the scope of the servant's authority, the railway is liable, even though the act be a trespass.⁴ Thus,⁵ in a case where the plaintiff was a passenger in the defendant's omnibus, and was removed by the conductor, a servant of the defendant, in such a manner that the plaintiff fell into the road and was severely injured, Pollock, C. B., said : "I do not believe he intended to do any mischief, but his want of care clearly was the cause of the mischief, and therefore I think the effect of the evidence is that the servant, by carelessly executing his master's

¹ Peck *v.* N. Y. C. & H. R. R. R., 70 N. Y. 587.

² P. R. R. *v.* Vandiver, 42 Penna. St. 365.

³ P. W. & B. R. R. *v.* Brannen, 17 Weekly Notes of Cases (Penna.) 227.

⁴ Yarborough *v.* Bank of England, 16 East. 6 ; Whitfield *v.* S. E. Ry., 1 El. Bl. & El. 115, 96 E. C. L. ; Green *v.* L. G. Omnibus Co., 7 C. B. N. S. 290, 97 E. C. L. ; Limpus *v.* Sume, 1 H. & C. 526 ; Roe *v.* B. L. & C. J. Ry., 7 Ex. 36.

⁵ Seymour *v.* Greenwood, 7 H. & N. 354.

commands, caused the mischief complained of, and that is what I should have found had I been on the jury. There is no doubt that the law on this subject was once very much confused, and when *McManus v. Crickett*¹ was decided, the law had not been settled. I think the view we take of this case is quite in conformity with all the more recent decisions. Public safety and private convenience require that we should so decide; for if we were to hold that a railway company is not to be responsible for the act of its servant, causing damage to a third person, *unless it be an act done in the mere negligent obedience to the orders of the company, there would be no protection to the public.*" And Martin, B., added: "I have no doubt that if the conductor used unnecessary violence in removing the plaintiff, the master would be responsible. If, by an act done by a servant within the scope of his ordinary employment, another person is injured, that person may maintain an action against the master; and the act of removing the plaintiff from the omnibus was within the scope of the conductor's ordinary employment. * * * The criterion is not whether the master has given the authority to do the particular act, but whether the servant does it in the ordinary course of his employment."

110. The railway is, therefore, liable for the acts of its conductors, brakemen, guards, or porters, in wrongfully ejecting either passengers or trespassers from its trains, or in rightfully ejecting such persons with unnecessary force;² and for the acts of a station master in ejecting

¹ 1 East. 107.

² *Seymour v. Greenwood*, 7 H. & N. 354; *Bayley v. M. S. & L. Ry.*, L. R. 7, C. P. 415, 8 Id. 148; *P. R. R. v. Vandiver*, 42 Penna. St. 365; *R. R. v. Finney*, 10 Wisc. 388; *Weed v. P. R. R.*, 17 N. Y. 362; *Moore v. F. R. R.*, 4 Gray 465; *Holmes v. Wakefield*, 12 Allen 580; *L. N. A. & C. R. R. v. Dunkin*, 92 Ind. 601, 15 Am. & Eng. R. R. Cas. 422; *State v. Ross*, 2 Dutcher 224; *Coleman v. N. Y. & N. H. R. R.*, 106 Mass. 160; *Brokaw v. N. J. R. R.*, 3 Vroom 328; *C. & A. R. R. v. Flagg*, 43 Ill. 364; *E. & C. R. R. v. Banin*, 26 Ind. 70; *G. W.*

with unnecessary violence one who was loitering in the station;¹ and for injuries caused by assaults by its servants upon passengers while the servants are acting within the scope of their authority.²

111. Some of the cases³ hold that the forcible removal of trespassers from a railway train does not fall within the implied authority of train hands, and that to render the railway liable for damages done by such an act an express authority must be shown. The doctrine of most of the cases, however, is, that wherever a railway servant is put in charge of any property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine-driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is, therefore, for that purpose vested with an implied authority to remove trespassers therefrom; and if he makes a mistake, either by removing a person who is rightfully therein or thereon, or by using unnecessary violence in the removal of a trespasser, the railway must be held liable for all such injuries as result, in the one case from the

R. R. *v.* Miller, 19 Mich. 305; Jackson *v.* S. A. R. R., 47 N. Y. 274; Kline *v.* C. P. R. R., 39 Cal. 537; Higgins *v.* W. T. & R. R., 46 N. Y. 23; C. C. & I. R. R. *v.* Powell, 40 Ind. 37; Sanford *v.* E. A. R. R., 23 N. Y. 343; Marquette *v.* C. & N. W. Ry., 33 Iowa 562; Carter *v.* L. N. A. & C. R. R., 98 Ind. 522, 22 Am. & Eng. R. R. Cas. 360; Kline *v.* C. P. R. R., 37 Cal. 400; Schultz *v.* T. A. R. R., 89 N. Y. 242, 19 Am. & Eng. R. R. Cas. 579; N. Y. C. & H. R. R. R. *v.* Hoffman, 87 N. Y. 25, 4 Am. & Eng. R. R. Cas. 537; Benton *v.* C. R. I. & P. R. R., 55 Iowa 496.

¹ Johnson *v.* C. R. I. & P. Ry., 58 Iowa 348, 8 Am. & Eng. R. R. Cas. 206.

² Bayley *v.* M. S. & L. Ry., L. R. 7, C. P. 415, 8 Id. 148; P. R. R. *v.* Vandiver, 42 Penna. St. 365; I. B. & W. Ry. *v.* Burdge, 94 Ind. 46, 18 Am. & Eng. R. R. Cas. 192; Ramsden *v.* B. & A. R. R., 104 Mass. 117; Heenrich *v.* P. P. C. Co., 20 Fed. Rep. 100, 18 Am. & Eng. R. R. Cas. 379; W. St. L. & P. Ry. *v.* Rector, 104 Ill. 296, 9 Am. & Eng. R. R. Cas. 264.

³ T. C. Co. *v.* Heeman, 86 Penna. St. 418; Cauley *v.* P. C. & St. L. Ry., 98 Id. 498; P. A. & M. P. Ry. *v.* Donahue, 70 Id. 119; Penna. Co. *v.* Toomey, 91 Id. 256; Manon *v.* C. R. I. & P. Ry., 59 Iowa 428, 8 Am. & Eng. R. R. Cas. 177.

removal, and in the other case from the unnecessary violence with which that removal is effected.

112. A railway is also liable for the acts of its servants in the exercise of statutory power conferred upon the railway to arrest persons attempting to defraud them.¹ It is held in some cases, that where the railway has no power under its charter to make an arrest, the railway is not liable, for there cannot be an implied authority to its servants to do that which the corporation has no charter power to do.² In other cases,³ it is held that railways are liable for wrongful arrests made by their servants in the mistaken exercise of the authority vested in them by the railway, and that in such a case it constitutes no defence to the railway that its agent in doing the act did that which the railway was not authorized by its charter to do, and that which the railway had not empowered its servant to do. Upon the same principle a railway was held liable⁴ for the act of its servant in seizing a passenger's luggage to enforce payment of his fare. The doctrine of the last-mentioned class of cases seems to be sound, for, if the person who does the wrongful act be, in fact, a servant of the railway, and if the act be done in furtherance of the general purposes of the railway, and not to accomplish an independent personal purpose on the part of the servant, the railway ought to be held liable therefor, on the ground of an implied delegation to the servant of authority for the

¹ *E. C. Ry. v. Broom*, 6 Ex. 314; *Chilton v. L. & C. Ry.*, 16 M. & W. 212; *Roe v. B. L. & C. J. Ry.*, 7 Ex. 36; *Savaignac v. Roome*, 6 T. R. 125; *Moore v. N. Ry.*, L. R. 8 Q. B. 36; *Bank of New South Wales v. Owston*, 4 App. Cas. 270; *Edwards v. L. & N. W. Ry.*, L. R. 5 C. P. 445; *Allen v. L. & S. W. Ry.*, L. R. 6 Q. B. 65; *Goff v. G. N. Ry.*, 3 E. & E. 672, 107 E. C. L.

² *Poulton v. L. & S. W. Ry.*, L. R. 2 Q. B. 534; *Emerson v. N. N. Co.*, 2 Ont. (Can.) 528.

³ *Lynch v. M. E. Ry.*, 90 N. Y. 77, 12 Am. & Eng. R. R. Cas. 119; *E. & T. H. R. R. v. McKee*, 99 Ind. 519, 22 Am. & Eng. R. R. Cas. 366.

⁴ *Ramsden v. B. & A. R. R.*, 104 Mass. 117.

performance of the particular act, and the doctrine of *ultra vires* cannot be held to negative the implication of such a delegation, unless, in the words of Kelly, C. B., in his dissenting judgment in *Mill v. Hawker*,¹ corporations are "not to be liable for any tort at all committed or authorized by them."

113. A railway is liable for an assault committed by a servant under the orders of an executive officer of the company, thus: where a servant of one railway was wounded by a pistol shot fired by some one of the servants of another railway, acting under the orders of the vice-president and general manager of their line, in an attempt to take forcible possession of the line of the first-mentioned railway, the last-mentioned railway was held liable in damages to the injured person.²

114. A railway is also liable for the act of its servant in attempting to bribe an adverse witness, the servant being engaged to prepare for trial actions against the company, and the fact of such attempted bribery being admissible in evidence against the company on the trial of an action for injuries to the person, in which action the person sought to be bribed was a witness.³

115. Railways are not liable for a mistaken exercise of judgment upon the part of their servants in an emergency;⁴ nor, for a failure upon the part of their servants to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation; thus,⁵ where a passenger railway car was approaching a switch, and the attention of the driver was necessarily directed to the switch, and a boy

¹ L. R. 9 Ex. 309, 10 Id. 92.

² D. & R. G. Ry. *v.* Harris, New Mex. , 15 Am. & Eng. R. R. Cas. 142.

³ C. C. Ry. *v.* McMahon, 103 Ill. 485, 8 Am. & Eng. R. R. Cas. 68.

⁴ Banks *v.* H. St. Ry., 136 Mass. 485, 19 Am. & Eng. R. R. Cas. 139; Bell *v.* H. & St. J. R. R., 72 Mo. 50, 4 Am. & Eng. R. R. Cas. 580.

⁵ H. M. & F. P. Ry. *v.* Kelley, 102 Penna. St. 115.

jumped on the front platform, remained there about thirty seconds, and in jumping off was injured, it was held that there was no negligence on the part of the defendant, Green, J., saying: "where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, we think there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, and a reasonable opportunity to discharge it."¹

VI. THE LIABILITY OF THE RAILWAY FOR ITS SERVANTS' WILFUL ACTS.

A railway is not liable for the wilful act of its servant beyond the scope of that servant's general authority, unless it be proven that there was an antecedent special authorization or subsequent ratification.

116. A railway is not liable for the wilful act of its servant beyond the scope of that servant's general authority, unless it can be proven that there was an antecedent special authorization or a subsequent ratification.² The per curiam judgment of the King's Bench

¹ Cotton *v.* Wood, 8 C. B. N. S. 568, 98 E. C. L.; Brown *v.* French, 14 Weekly Notes of Cases (Penna.) 412; Gumz *v.* C. M. & St. P. Ry., 52 Wisc. 672, 5 Am. & Eng. R. R. Cas. 583; Maschek *v.* St. L. R. R., 71 Mo. 276, 2 Am. & Eng. R. R. Cas. 38; Dunleavy *v.* C. R. I. & P. Ry., Iowa, 21 Am. & Eng. R. R. Cas. 542; Brown *v.* C. & B. St. Ry., 49 Mich. 153, 8 Am. & Eng. R. R. Cas. 385; C. & N. W. Ry. *v.* Smith, 46 Mich. 504, 4 Am. & Eng. R. R. Cas. 535; Jenkins *v.* C. M. & St. P. Ry., 41 Wisc. 112.

² McManus *v.* Crickett, 1 East. 106; Croft *v.* Alison, 4 B. & Ald. 590, 6 E. C. L.; Lawson *v.* Bank of London, 18 C. B. 84, 86 E. C. L.; Edwards *v.* L. & N. Ry., L. R. 5 C. P. 445; Walker *v.* S. E. Ry., L. R. 5 C. P. 640; E. C. Ry. *v.* Broom, 6 Ex. 314; Roe *v.* B. L. & C. J. Ry., 7 Id. 36; Smith *v.* B. & S. Gas Light Co., 1 A. & E. 526, 28 E. C. L.; Hays *v.* H. G. N. R. R., 46 Tex. 280; G. H. & S. A. R. R. *v.* Donahoe, 56 Id. 162, 9 Am. & Eng. R. R. Cas. 287; Isaacs *v.* T. A. R. R., 47 N. Y. 122; R. T. Co. *v.* Vanderbilt, 2 N. Y. 479; C. & N. W. Ry. *v.* Bayfield, 37 Mich. 205; I. C. R. R. *v.* Downey, 18 Ill. 259.

in *Croft v. Alison*,¹ states the distinction thus: "if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce an accident, the master will not be liable. But if, in order to perform his master's orders, he strike, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

117. Of course the railway is liable for a wilful assault by a servant beyond the scope of his employment, if it subsequently ratifies the act. Proof of ratification can be deduced from the fact that the railway, with knowledge of its servant's commission of an unauthorized assault on a passenger, has retained him in its service and promoted him.² But³ it has been held that a promise by a secretary of a railway to look into the matter, and the subsequent offer of a pecuniary compromise of the plaintiff's claim, was not evidence of a ratification by the railway of the unauthorized act of a servant in arresting the plaintiff for non-payment of fare; and the fact that the attorney of the railway attended before a magistrate at the hearing of a charge against the plaintiff, was held not to be a ratification of the unauthorized act of a servant in taking the plaintiff into custody and carrying him before a magistrate.⁴

118. It is, however, laid down by some authorities that the railway is liable for wilful assaults by its servants, even beyond the line of their duty, as, for instance, for

¹ 4 B. & Ald. 590, 6 E. C. L.

² *Bass v. C. & N. W. Ry.*, 39 Wis. 636, 42 Id. 654; *Gasway v. A. & W. P. Ry.*, 58 Ga. 216.

³ *Roe v. B. L. & C. J. Ry.*, 7 Ex. 36.

⁴ *E. C. Ry. v. Broom*, 6 Ex. 314.

the act of a conductor in kissing a female passenger;¹ for the act of a brakeman, who, when accused of theft by a passenger, struck the passenger in the face;² for the act of a conductor in calling a passenger out of a train at a way station and beating him;³ for the act of a brakeman in throwing water on a passenger while standing in the doorway of a car;⁴ for the act of a conductor in pointing a loaded revolver at a passenger, and forcing him to leap from a moving train;⁵ for the act of a conductor in wilfully insulting and assaulting a passenger, when the conductor was not engaged in the performance of his duties;⁶ for the act of an engine-driver in sounding the whistle of his engine unnecessarily, and with the intention of frightening horses;⁷ for insulting and offensive epithets⁸ applied by a railway servant to a passenger.⁹

119. On the other hand, it has been held that a railway is not liable for the act of a servant, who, having been placed at a car door to resist the entrance of passengers without tickets, assaulted a passenger who attempted to force an entrance;¹⁰ nor for the act of a

¹ *Craker v. C. & N. W. Ry.*, 36 Wisc. 657.

² *C & E R. R. v. Flexman*, 103 Ill. 546, 8 Am. & Eng. R. R. Cas. 354.

³ *Peeples v. B. & A. R. R.*, 60 Ga. 281.

⁴ *T. H. & I. R. R. v. Jackson*, 81 Ind. 19, 6 Am. & Eng. R. R. Cas. 178.

⁵ *Gallena v. H. S. R. R.*, 13 Fed. Rep. 116.

⁶ *Goddard v. G. T. Ry.*, 57 Me. 202; *Hanson v. E. & N. R. R.*, 62 Id. 84; *Maleck v. T. G. R. R.*, 57 Mo. 18; *Sherley v. Billings*, 8 Bush 147.

⁷ *C. B. & Q. R. R. v. Dickson*, 63 Ill. 151, 7 Am. Ry. Rep. 45.

⁸ *Bryant v. C. R. I. & P. Ry.*, 63 Iowa 464, 16 Am. & Eng. R. R. Cas. 335.

⁹ See, generally, *Pendleton v. Kinsley*, 3 Clif. 416; *Sherley v. Billings*, 8 Bush 147; *Chamberlain v. Chandler*, 3 Mason 242; *Bryant v. Rich*, 106 Mass. 180, 202; *Nieto v. Clark*, 1 Clif. 145; *B. & O. R. R. v. Blocher*, 27 Md. 277; *Stewart v. B. & C. Ry.*, 90 N. Y. 588, 12 Am. & Eng. R. R. Cas. 127, overruling *Isaacs v. Third Ave. R. R.*, 47 N. Y. 122; *I. & G. N. Ry. v. Kettle*, Tex., 16 Am. & Eng. R. R. Cas. 337; *Jackson v. Second Ave. R. R.*, 47 N. Y. 275; *Rounds v. D. L. & W. R. R.*, 64 Id. 137; *Day v. B. C. R. R.*, 76 Id. 593; *McKinley v. C. & N. W. Ry.*, 44 Iowa 314; *Gasway v. A. & W. P. R. R.*, 58 Ga. 216.

¹⁰ *Priest v. H. R. R. R.*, 65 N. Y. 589.

servant in striking with a hatchet a passenger who had provoked a quarrel with him,¹ nor for the act of a fireman in inducing a boy to assist in watering an engine,² nor for the act of a brakeman in ordering a boy to move a load of lumber on a car in motion,³ nor for the act of a brakeman in throwing a stone at a boy trespassing on a train,⁴ nor for the act of a conductor in forcing a trespassing boy to jump from a moving car,⁵ nor for the act of a driver of a street car in striking a boy and knocking him off the car,⁶ nor for the act of a conductor in pushing a trespasser off a moving car,⁷ nor for the act of an engine-driver in purposely driving his engine over cattle on the line,⁸ nor for the act of the driver of a street car in wilfully running his car into a wagon,⁹ nor for the act of a brakeman in abducting a boy from his home and carrying him away on a train.¹⁰

120. The reported actions against railways for wilful assaults committed by their servants may be classified in three categories: *first*, those in which the person injured was not a passenger of the railway; *second*, those in which the person injured was a passenger, and the assault was committed by the railway's servant at a time when he was engaged in the performance of his duty to the railway, as, for instance, when collecting the passenger's fare, or when preventing the passenger from entering, or remaining, in a particular car; and *third*, those

¹ L. M. R. R. v. Wetmore, 19 Ohio St. 110.

² Flower v. P. R. R., 69 Penna. St. 210.

³ Sherman v. H. & St. J. R. R., 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589.

⁴ Towanda Coal Co. v. Heeman, 86 Penna. St. 418.

⁵ Canley v. P. C. & St. L. Ry., 98 Penna. St. 498.

⁶ P. A. & M. P. Ry. v. Donahue, 70 Penna. St. 119.

⁷ Penna. Co. v. Toomey, 91 Penna. St. 256; Marion v. C. R. I. & P. Ry., 59 Iowa 428, 8 Am. & Eng. R. R. Cas. 177.

⁸ I. C. R. R. v. Downey, 18 Ill. 259.

⁹ Wood v. D. C. S. Ry., 52 Mich. 402, 19 Am. & Eng. R. R. Cas. 129.

¹⁰ Gilliam v. S. & N. A. R. R., 70 Ala. 268, 15 Am. & Eng. R. R. Cas. 138.

in which the person injured was a passenger of the railway, and the assault committed by the servant was not contemporaneous with that servant's performance of his duty to the railway. In each category the decisions are conflicting. In those of the first category, the railway is generally held not to be liable, and in those of the second and third categories, the railway is generally held to be liable. A careful consideration of this question upon principle will satisfy any one that the true rule of decision in every case, where it is sought to hold a railway responsible for the act of a servant causing injury to a person, whether that person be or be not a passenger, or whatever be the relation in which he stands to the railway, is to be found in the answer to the question, was the servant in doing the act performing, however negligently and however wrongfully, his duty to the railway, or was he accomplishing some purpose of his own, which had no necessary connection with the performance of his duty to the railway? If the former, the railway is liable; if the latter, the railway is not liable. In *Johnson v. C., R. I. & P. Ry.*,¹ where the railway was held liable for the act of its station master in ejecting the plaintiff from its station house rightfully, but with unnecessary violence, Rothrock, J., thus states the rule: "the true test by which to determine the liability of the master, or employer, for the negligent or wrongful acts of the servant, or employé, in all this class of cases is, was the wrongful or negligent act done in the course and scope of the employment of the servant, or agent? If it was, the employer is liable. But if the employé does any act out of his employment * * the employer is not liable. For example, if an agent, conductor, or other employé should assault a loafer in a waiting-room in a personal quarrel, having

¹ 58 Iowa 348, 8 Am. & Eng. R. R. Cas. 206.

no relation to his employment, the company would not be liable in damages."

121. Many of the cases hold that the railway is liable to its passengers for unauthorized and wilful assaults by its servants when it would not be liable to persons other than passengers for such assaults. The ground of decision in such cases is thus stated by Tracy, J.:¹ "By the defendant's contract with the plaintiff, it had undertaken to carry him safely, and to treat him respectfully; and while a common carrier does not undertake to insure from injury against every possible danger, it does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which a carrier owes to the passenger." The fallacy in this reasoning can be readily pointed out. It is based on a misapprehension of the railway's implied obligation to its passengers. The railway does not insure their safe transportation. It does not warrant to them the security of its line, nor the roadworthiness of its carriages, nor the capability of its servants. The duty of the railway to its passenger is performed to its full measure when the railway exercises the highest possible care in the construction and operation of its line, machinery, and appliances, and in the selection, organization, and discipline of its servants. It is liable to its passengers only for negligence, and it is not negligence upon its part, when a servant who has been carefully selected, and for whose guidance in the performance of his duties judicious regulations have been prescribed, but who is nevertheless human and mortal, and, therefore, to some extent, at least, both fallible and self-willed, does that, in the exercise of his own volition and to serve his own purposes, which the railway has not expressly nor im-

¹ *Stewart v. B. & C. R. R.*, 90 N. Y. 588, 12 Am. & Eng. R. R. Cas. 127.

pliedly authorized him to do on its behalf. To hold the railway liable in such a case is not consistent, either with the principles upon which rests the responsibility of railways to their passengers for injuries caused by a failure of their means of transportation, or with those other rules of law of wider application which determine the liability of principals for the acts of their agents. It does not affect the question to argue, as Mr. H. G. Wood has argued,¹ that because a common carrier of goods is absolutely liable for its servants' loss of or wanton injury to the goods which it has contracted to carry, that, therefore, "it would be a singular rule and an absurd one, that did not hold the carriers of passengers" responsible for injuries wilfully inflicted by its servants upon those passengers. It is only necessary, in reply to this view, to refer to the judgment of Montague Smith, J., in *Readhead v. Midland Ry.*,² where he shows the essential distinction between the implied obligations of carriers of goods and of passengers. It must be remembered that science has not yet enabled railways to manufacture their servants to order. They must take as those servants sentient human beings, each of whom has an individuality which cannot be altogether repressed. All that the railway can do in the exercise of the highest possible care is to prudently select and train its servants, and to make wise regulations for their government, and when it has done that it is a plain injustice to hold the railway responsible for its servant's wilful and unauthorized act.

¹ Law of Master and Servant 648 *et seq.*, 2 Law of Railroads 1196.

² L. R. 4 Q. B. 379.

CHAPTER III.

THE LIABILITY OF RAILWAYS FOR THE ACTS OF INDEPENDENT CONTRACTORS.

- I. The general rule of liability for the negligence of contractors.
- II. The liability for a wrongful act done in pursuance of a contract.
- III. The liability for a contractor's non performance of a duty incumbent on the railway.
- IV. The railway's obligation to anticipate negligence on the part of its contractor.

I. THE GENERAL RULE OF LIABILITY FOR THE NEGLIGENCE OF CONTRACTORS.

A railway is not liable for the negligence of an independent contractor or of his servants in the course of the prosecution of a lawful work.

122. It often happens, in the course of railway operations, that independent contractors who are not servants of the railway are engaged *pro hac vice* to perform some specified work of construction, alteration, or repair. The earlier cases held him who had delegated to another the performance of any act, or who had contracted with that other for its performance, liable not only for all the acts done by the contractor in the exercise of the delegated authority and in the performance of the contract, but also liable for the negligence of the contractor, and of the contractor's servants. Thus, in *Bush v. Steinman*,¹ the defendant being the owner of a house, contracted with a surveyor to repair it, and the surveyor sublet the contract to a carpenter, who employed a bricklayer, who contracted with a lime-burner for lime, which the lime-burner's servant placed on the highway in

¹ 1 Bos. & Pul. 404.

front of the house, and the plaintiff, having been injured by reason of his carriage being overturned on the lime, brought his action and recovered against the defendant, Rooke, J., saying, "the person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." The same view is taken in two other cases,¹ but the doctrine of these cases has long since been overruled. In *Laugher v. Pointer*,² and in *Quarman v. Bennett*,³ where the question was as to liability for the negligence of an independent contractor where the contract had reference to personal property, *Bush v. Steinman* was sought to be distinguished upon the ground that the contract in question in that case related to fixed property, and that therefore the owner was to be held liable, but this shadowy and unsubstantial distinction was rejected and finally overthrown in *Reedie v. L. & N. W. Ry.* and *Hobbitt v. Same*,⁴ in which cases the plaintiffs sued under Lord Campbell's Act, as widows of persons who were killed while passing on a highway under a viaduct in course of construction as part of the defendant's line, the accident having resulted from the negligence of the workmen employed by a contractor who had undertaken to build the viaduct. The jury having found for the plaintiffs, a rule for a new trial was made absolute, Rolfe, B., saying, "the case of *Bush v. Steinman*, where the owner of a house was held liable for the act of a servant of a subcontractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument in support of the liability of the defendants, both in *Laugher v. Pointer* and

¹ *Sly v. Edgeley*, 6 Esp. 6, and in *Matthews v. W. L. Waterworks Co.*, 3 Camp. 403.

² 5 B. & C. 547, 12 E. C. L.

³ 6 M. & W. 499.

⁴ 4 Ex. 243.

Quarman *v.* Bennett; and as the circumstances of those two cases were such as not to make it necessary to overrule Bush *v.* Steinman, if any distinction in point of law did exist, in cases like the present, between fixed property and ordinary movable chattels, it was right to notice the point. But, on full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance ; and in fact that, according to the modern decisions, Bush *v.* Steinman must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded. * * * Mr. Justice Littledale in his very able judgment in Laugher *v.* Pointer, observed that the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable, you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment ; and applying the principle to the present case, it would be impossible to hold the present defendants liable, without, at the same time, deciding that the contractors are not liable, which it would be impossible to be contended. It remains only to be observed that in none of the more modern cases has the alleged distinction between real and personal property been admitted. Our attention was directed during the argument to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskillful, did

not make him their servant." In *Painter v. Pittsburgh*,¹ Strong, J., said that *Bush v. Steinman* "long since ceased to be regarded as a correct enunciation of the law in England, and both its reasoning and authority are denied."²

123. The modern doctrine is that if an independent contractor is employed to do a lawful act, the employer not reserving a control over the manner of its performance, and in the course of the work he or his servant commits some casual act of negligence, the employer is not answerable.³ By force of these principles, a railway is not liable for injuries done in the operation of its line while in process of construction by a contractor;⁴ but where a passenger is injured while being trans-

¹ 46 Penna. St. 213, 221.

² See also *Hilliard v. Richardson*, 3 Gray 349; *DeForrest v. Wright*, 2 Mich. 368.

³ *Pickard v. Smith*, 10 C. B. N. S. 480, 100 E. C. L.; *Overton v. Freeman*, 11 C. B. 867, 73 E. C. L.; *Knight v. Fox* 5 Ex. 721; *Allen v. Hayward*, 7 Q. B. 960, 53 E. C. L.; *Steel v. S. E. Ry.*, 16 C. B. 550, 81 E. C. L.; *Peachey v. Rowland*, 13 C. B. 181, 76 E. C. L.; *Brown v. A. C. S. & M. Co.*, 3 H. & C. 511; *Pearson v. Cox*, 2 C. P. D. 369; *Rapson v. Cubitt*, 9 M. & W. 710; *Hilliard v. Richardson*, 3 Gray 349; *Scummon v. Chicago*, 25 Ill. 424; *School District of Erie v. Fuess*, 98 Penna. St. 600; *Smith v. Simmons*, 13 Weekly Notes of Cases (Penna.) 242; *Allen v. Willard*, 57 Penna. St. 374; *Wray v. Evans*, 80 Id. 102; *Milligan v. Wedge*, 12 A. & E. 737, 40 E. C. L.; *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. D. 205; *Hall v. Smith*, 2 Bing. 156; as explained by Alderson, B., in *Scott v. Mayor of Manchester*, 1 H. & N. 59; (*Wiggett v. Fox*, 11 Ex. 832, as explained by Channell, B., in *Abraham v. Reynolds*, 5 H. & N. 143, and dissented from by Cockburn, C. J., in *Rourke v. Colliery Co.*, 2 C. P. D. 205;) *Painter v. Pittsburgh*, 46 Penna. St. 213; *Ardesco Oil Co. v. Gilson*, 63 Id. 146; *Erie v. Caulkins*, 85 Id. 247; *Borough of Susquehanna Depot v. Simmons*, 17 Weekly Notes of Cases (Penna.) 362; *Reed v. Allegheny*, 79 Pa. St. 300; *Barry v. St. Louis*, 17 Mo. 121; *Blake v. Ferris*, 5 N. Y. 58; N. O. & N. E. R. R. v. *Reese*, 61 Miss. 581; *Hughes v. C. & S. Ry.*, 15 Am. & Eng. R. R. Cas. 100, and note, Ohio St.; *Linton v. Smith*, 8 Gray 147; *DeForrest v. Wright*, 2 Mich. 368; *McCafferty v. S. D. & P. M. R. R.*, 61 N. Y. 178; *Boswell v. Laird*, 8 Cal. 469; *Clark v. Fry*, 8 Ohio St. 358; *Hofnagle v. N. Y. C. & H. R. R. R.*, 55 N. Y. 608; *King v. N. Y. C. & H. R. R. R.*, 66 Id. 181; *Hexamer v. Webb*, 101 Id. 377.

⁴ *K. C. Ry. v. Fitzsimmons*, 18 Kans. 34, 15 Am. Ry. Rep. 220; *Cunningham v. I. R. R.*, 51 Tex. 503; *U. P. R. R. v. Hause*, 1 Wyoming 27.

ported over a line which is in process of construction by contractors, and which has not been formally received from the contractors, but the train is manned by servants of the railway, and the passenger's injuries are caused by the negligence of those servants, the railway must be held liable therefor.¹

Where the railway, having contracted for the performance of a work, has reserved to itself the control both of the result and of the means by which that result is to be accomplished, it is liable for the negligence of the contractor and his servants.

124. Where the railway has contracted for the performance of a work, and has reserved to itself control both of the result and of the means by which that result is to be accomplished, the contractor and his servants are the servants of the railway, and the railway is held liable as master for their acts.² In *Randleson v. Murray*,³ the defendant was a warehouseman who engaged a master porter to remove a barrel from his warehouse, the master porter employing his own workmen and tackle, and from the negligence of those men the tackle failed, the barrel fell, and the plaintiff was injured. The case as reported does not distinctly show whether the master porter was engaged merely for the particular job or whether he was engaged by the day or week for the removal of other barrels. Coleridge, J., directed the jury to find a verdict for the plaintiff if they considered there had been negligence in the use of the tackle, and a verdict having passed for the plaintiff, a rule for a new trial was refused, Denman, C. J.,

¹ *Burton v. G. H. & S. A. R. R.*, 61 Tex. 526, 21 Am. & Eng. R. R. Cas. 218.

² 8 A. & E. 109, 35 E. C. L. See also *Milligan v. Wedge*, 12 A. & E. 737, 40 E. C. L.; *Sadler v. Henlock*, 4 El. & Bl. 570, 82 E. C. L.; *Blake v. Thirst*, 2 H. & C. 20; *Stone v. Utiea*, 17 N. Y. 104; *N. O. M. & C. R. R. v. Hanning*, 15 Wall. 649.

³ 8 A. & E. 109, 35 E. C. L.

saying : " Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative," and Littledale, J., adding : " It seems to me to make no difference whether the persons whose negligence occasions the injury be the servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case." In the later case of *Milligan v. Wedge*,¹ where the defendant, a butcher, having bought a bullock, had engaged a licensed drover to drive it from the Smithfield Market, and the drover employed a boy by whose negligence the bullock escaped and injured the plaintiff, the jury having found specially that the boy was not defendant's servant, but having found a verdict for the plaintiff on the general issue, Denman, C. J., said with regard to *Randleson v. Murray* : " The work was in effect done by the defendant himself at his own warehouse. If he chose instead of keeping a porter to hire one only for the day, he did not thereby cease to be liable for injury done by the porter while under his control. Here it does not appear that the defendant attended the drover or his servant, and the mischief was done, not in the course of the butcher's business, but of the drover's." And Williams, J., added : " I agree with the decision of *Randleson v. Murray*, for the warehouseman's servant, whether daily or weekly, is equally under the control of the warehouseman ;" and Coleridge, J., said : " The true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master

¹ 12 A. & E. 737, 40 E. C. L.

and servant exist between them, the act of the one creates no liability in the other." Therefore, reading Randleson *v.* Murray as it is explained in Milligan *v.* Wedge, it is not inconsistent with the later cases. Under the doctrine of this section, two recent cases have been decided: thus, where a railway company contracted with an individual to take entire charge of its freight business at its terminus, under the supervision of the railway superintendent, the railway was held liable to a person injured by the negligent handling of a train by the contractor's servants,¹ and where a railway permitted a contractor to exercise its franchise of running cars drawn by steam over its line,² the railway was held liable for injuries done by the negligence of the contractor's servants.

The reservation to the railway of a limited control over the manner of doing the work will not render the railway liable for the contractor's negligence.

125. The fact that the contract requires the contractor to do the work in accordance with the plans, specifications, and instructions furnished by the railway will not render the railway liable,³ nor that the contract reserves to the railway power to insist on the removal of careless or incompetent workmen employed by the contractor;⁴ nor that the contract reserves to the railway power to direct changes in the time and manner of doing the work;⁵ nor that the contract reserves to the railway the right to direct as to the quantity of work to be done, or as to the condition of the work when completed;⁶ nor

¹ Speed *v.* A. & P. R. R., 71 Mo. 303, 2 Am. & Eng. R. R. Cas. 77.

² M. & A. R. R. *v.* Mayes, 49 Ga. 355.

³ Hunt *v.* P. R. R., 51 Penna. St. 475; Smith *v.* Simmons, 103 Id. 32.

⁴ Reedie *v.* L. & N. W. Ry., 4 Ex. 243.

⁵ Erie *v.* Caulkins, 85 Penna. St. 247.

⁶ Hughes *v.* C. & S. Ry., 39 Ohio St. 461, 15 Am. & Eng. R. R. Cas. 100.

that the contractor is paid by the day;¹ nor that the contractor's servant whose negligence caused the injury is paid by the railway while directed and controlled in his action by the contractor.²

II. THE LIABILITY FOR A WRONGFUL ACT DONE IN PURSUANCE OF THE CONTRACT.

The railway will be liable where the injury is done by a wrongful act performed by the contractor in the execution of his contract.

126. The doctrine of the independent contractor will not exempt a railway from liability where the act which occasions the injury is one which the contractor was engaged to do, and which he has done in pursuance of his contract, and where the act in itself is a wrong. In such cases the employer is, of course, liable, for the contractor in fulfilling his contract is the employer's agent. Thus in *Hole v. S. & S. Ry.*,³ the defendant, being authorized by Act of Parliament to construct a railway draw-bridge across a navigable river, had employed a contractor, by whose negligence in the construction of the bridge the bridge, when completed, could not be opened, and the plaintiff's vessel was prevented from navigating the river. After verdict for the plaintiff a rule for a new trial was discharged, Pollock, C. B., saying: "This is a case in which the maxim '*qui facit per alium facit per se*' applies. Where a person is authorized by an Act of Parliament or bound by contract to do a particular work he cannot avoid responsibility by contracting with another person to do that work. Where the act complained of is purely collateral and arises incidentally in the course of the performance of the work, the employer is not lia-

¹ *Harrison v. Collins*, 86 Penna. St. 153; *Hexamer v. Webb*, 101 N. Y. 377.

² *Rourke v. White Moss Colliery Co.*, I. R. 2 C. P. D. 205.

³ 6 H. & N. 488.

ble, because he never authorized the act—the remedy is against the person who did it. * * * But when the contractor is employed to do a particular act, the doing of which causes mischief, another doctrine applies. Here the legislature employed the company to build the bridge; in building that bridge the contractor created an obstruction to the navigation, and for that the company are liable.”¹

III. THE LIABILITY FOR THE CONTRACTOR'S NON-PERFORMANCE OF A DUTY INCUMBENT ON THE RAILWAY.

The railway is liable where the injury is done by the contractor's non-performance of a duty whose performance was incumbent upon the railway.

127. So also the employer is liable where the contractor, having been entrusted with the performance of a duty incumbent upon the employer, neglects its fulfillment, whereby an injury is occasioned. Thus in *Pickard v. Smith*,² Willianis, J., after stating the general rule of non-liability for the negligence of an independent contractor, added: “That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning to cases in which the contractor, having been entrusted with the performance of a duty incumbent upon the employer, neglects its fulfillment, whereby an injury is occasioned. * * * * If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes

¹ See also *Ellis v. Sheffield G. C. Co.*, 2 E. & B. 767, 75 E. C. L.; *Blake v. Thirst*, 2 H. & C. 20; *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L.; *Tarry v. Ashton*, 1 Q. B. D. 314; *Chicago v. Robbins*, 2 Black 418; *Robbins v. Chicago*, 4 Wall. 657; *Clark v. Fry*, 8 Ohio St. 359; *Lowell v. B. & L. R. R.*, 23 Pick. 24; *St. P. Water Co. v. Ware*, 16 Wall. 566; *R. R. I. & St. L. R. R. v. Wells*, 66 Ill. 321; *C. & St. L. R. R. v. Woosley*, 85 Id. 370.

² 10 C. B. N. S. 483, 100 E. C. L.

no excuse either in good sense or law." And in *Bower v. Peate*,¹ the plaintiff and the defendant being owners of adjoining houses, and the plaintiff being entitled to lateral support for his house from the defendant's soil, the defendant employed a contractor to pull down his house, excavate the cellar, and rebuild, the contractor stipulating to underpin the plaintiff's house and make good any damages. The plaintiff's house having been injured by the negligence of the contractor's servant, it was held that the defendant was liable, Cockburn, C. J., saying: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not, in fact, prevented, no matter through whose default the omission to take the necessary meas-

¹ 1 Q. B. D. 326.

ures for such prevention may arise." Bower *v.* Peate is recognized and approved by the House of Lords in *Dalton v. Angus*.¹

IV. THE RAILWAY'S OBLIGATION AS TO THE ANTICIPATION OF NEGLIGENCE ON THE PART OF ITS CONTRACTOR.

The railway is not negligent if it does not anticipate and guard against the negligence of a carefully selected contractor, to whom it has entrusted the prosecution of a lawful work.

128. A railway is not bound to anticipate that a carefully selected and experienced contractor will do his work negligently, and, therefore, the railway is not liable if it fails to take precautions against possible negligence on the part of the contractor or of his servants; thus in *Daniels v. M. Ry.*,² Lord Westbury, with that clear appreciation of the practical effects of rules of law which is always to be found in the judgments of the House of Lords, said: "The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. Undoubtedly it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation to do that which,

¹ 6 App. Cas. 740. See also *Homan v. Stanley*, 66 Penna. St. 464; *The M. D. Trustees v. Gibbs*, L. R. 1 H. L. 116.

² L. R. 5 H. L. 61.

to him, in many cases, would be impossible, namely, to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons." On the other hand, in *V. C. R. R. v. Sanger*,¹ the railway was held liable to a passenger who was injured by the derailment of a train, resulting from the fall of a stone from an embankment then in process of construction by a contractor employed by the railway, it being held that the railway was negligent in failing to guard against such an accident. The right doctrine, however, would seem to be that which is so clearly stated by Lord Westbury.

¹ 15 Gratt. 230.

CHAPTER IV.

THE RAILWAY'S LIABILITY FOR THE ACTS AND OMISSIONS OF OTHER RAILWAYS AND OF PERSONS OTHER THAN SERVANTS AND CONTRACTORS.

- I. The general rule determining the liability.
- II. The liability of railways for lessees.
- III. The liability of railways for mortgage trustees in possession.
- IV. The liability of railways for receivers.
- V. The liability of railways for means of transportation under the immediate control of third parties.
- VI. The liability of railways for connecting lines.
- VII. The liability of a railway for the negligence of other railways which under statutory authority use its line.
- VIII. The liability of a railway for other railways or individuals which by contract use its line.

I. THE GENERAL RULE DETERMINING THE LIABILITY.

The railway is liable for the negligent acts of other corporations and of individuals, which hold to it a relation of agency.

129. Upon the principles stated in the preceding chapters, the railway is not liable for the negligent acts of those who are not its agents, and this doctrine is further illustrated in the cases of injuries done in the operation of a railway line by a receiver appointed by a court of competent jurisdiction, or by mortgage trustees in exclusive possession of the line, and also in the cases of injuries done by negligence upon the part of another railway, which exercises statutory running powers over the line, or which operates the line by virtue of a lease made under express statutory authority; but the converse of the proposition is illustrated in the cases of injuries done in the operation of a line by a

lessee to whom the line has been leased without express statutory authority, and also in the cases of injuries done to a passenger by the failure of a means of transportation which is under the control of a third party.

II. THE LIABILITY OF RAILWAYS FOR THE NEGLIGENCE OF LESSEES.

The railway is liable for the negligent acts of a lessee of its line, when the lease has not been expressly authorized by statute, and not liable when the lease has been so authorized.

130. A railway cannot without express statutory authority divest itself of its franchise, or delegate to others the performance of that duty which the legislature has imposed upon it; thus, in *Gardner v. L. C. & D. Ry.*,¹ Cairns, L. J., said, "when Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, yet it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed, and these duties be discharged by the company. They cannot be delegated or transferred." * * * So, in *W. A. & G. R. R. v. Brown*,² Davis, J., said, "it is the accepted doctrine in this country, that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees." These views are abundantly supported by other

¹ L. R. 2 Ch. 201.

² 17 Wall. 445.

authorities.¹ Therefore, where the lease has not been authorized by express statutory authority, both the lessor and lessee railways are liable for injuries done by the lessee's negligent operation of the line.² Upon the same principle, a railway is also liable for negligence on the part of persons whom it voluntarily permits to exercise its franchise of running cars over its line.³

131. On the other hand, where a railway, under due authority of law, has leased its line to another railway, the lessor railway is not liable for torts committed by the lessee railway in the operation of the line.⁴ Yet, in *Singleton v. S. W. R. R.*,⁵ where a lease had been authorized by statute, the lessor railway was held liable to a passenger who was injured by the negligent operation of a train by the servants of the lessee railway, upon the ground that the statute authorizing the lease did not, in terms, exempt the lessor railway from liability; but this case is certainly in conflict with the current of authority.

132. A railway operated on joint account by receivers of part of its line, and also by lessees of the remaining part thereof, is liable where the railway has permitted tickets to be issued in its name for transportation over the whole line;⁶ for, as Davis, J., said, "the

¹ *Y. & M. L. R. R. v. Winans*, 17 Howard 30; *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. B. L. & C. J. Ry.*, 5 De G. & S. 562, 16 Jur. 1035; *G. N. Ry. v. E. C. Ry.*, 9 Hare 306; *Black v. D. & R. Canal Co.*, 22 N. J. Eq. 130; *M. R. R. v. B. & C. R. R.*, 115 Mass. 347; *Thomas v. W. J. Ry.*, 101 U. S. 71.

² *I. C. R. R. v. Barron*, 5 Wall. 90; *C. & St. L. R. R. v. McCarthy*, 20 Ill. 385; *C. & R. I. R. R. v. Whipple*, 22 Id. 105; *Nelson v. V. C. R. R.*, 26 Vt. 717; *McElroy v. N. R. R.*, 4 Cush. 400; *Y. & M. L. R. R. v. Winans*, 17 How. 30; *Freemann v. M. & St. L. Ry.*, 28 Minn. 443, 7 Am. & Eng. R. R. Cas, 410; *Speed v. A. & P. R. R.*, 71 Mo. 303; 2 Am. & Eng. R. R. Cas. 77.

³ *M. & A. R. R. v. Mayes*, 49 Ga. 355.

⁴ *Mahony v. A. & St. L. R. R.*, 63 Me. 68; *Ditchett v. St. P. D. & P. M. R. R.*, 67 N. Y. 425.

⁵ 70 Ga. 464, 21 Am. & Eng. R. R. Cas. 226.

⁶ *W. A. & G. R. R. v. Brown*, 17 Wall. 445.

company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts."

III. THE LIABILITY OF RAILWAYS FOR THE NEGLIGENCE OF MORTGAGE TRUSTEES IN POSSESSION.

The railway is not liable for injuries done in the operation of its line by trustees in possession under a mortgage duly executed under express statutory authority.

133. A railway cannot, without express statutory authority, mortgage its franchise or line.¹ But where a mortgage has been duly executed under such authority, and the mortgage trustees have entered into possession of the line in accordance with the terms of such a mortgage, the railway is not liable for injuries done by the mortgage trustees or their servants.² Mortgage trustees in possession are liable for injuries caused by their neglect or that of their servants, and this liability is enforceable in any jurisdiction in which they may be properly served with process.³ A corporation or an individual, who, by voluntary conveyance, becomes the legal successor of a railway and the assignee of its assets, takes those assets charged with the liabilities encumbering them, including claims for damages for personal injuries;⁴ but purchasers of a railway under a judicial foreclosure of a mortgage are not liable for injuries done prior to

¹ *Gardner v. L. D. & C. Ry.*, L. R. 2 Ch. 201; *Commonwealth v. Smith*, 10 Allen 448; *Carpenter v. Mining Co.*, 65 N. Y. 43; *S. C. Co. v. Bonham*, 9 W. & S. 27; *Atkinson v. M. & C. R. R.*, 15 Ohio St. 21.

² *State v. E. & N. A. Ry.*, 67 Me. 479.

³ *Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; *Lamphear v. Buckingham*, 33 Conn. 237; *Rogers v. Wheeler*, 43 N. Y. 598; *Smith v. E. R. R.*, 124 Mass. 154.

⁴ *M. & W. P. R. R. v. Boring*, 51 Ga. 582.

their entry into possession of the railway,¹ unless such a liability be imposed by statute.²

IV. THE LIABILITY OF RAILWAYS FOR THE NEGLIGENCE OF RECEIVERS.

The railway is not liable for injuries done in the operation of its line by a receiver who has been appointed by a court of competent jurisdiction, and is in exclusive possession of the line.

134. A railway whose line is in the custody of, and operated by a receiver, is not liable in damages for injuries resulting from the negligence of the receiver or his servants.³ Receivers in possession and operating railways are personally liable for their individual breaches of contract and torts, but not for torts committed by the servants whom they employ in the operation of the railway. Railway receivers are liable in their official capacity, and to the extent of the property in their custody, as such receivers, for their breaches of contract, and for all torts done by themselves or their servants in the course of the operation of the railway.⁴ So, where a receiver has, in obedience to a decree of court, relinquished possession of the railway line and property and been discharged, he cannot be compelled to make compensation to one who was injured in the course of the operation of the line by the negligence of

¹ W. & T. P. R. v. Griffin, 57 Penna. St. 417; Metz v. B. C. & P. R. R., 58 N. Y. 61.

² St. L., A. & T. H. R. R. v. Miller, 43 Ill. 199; Hatcher v. T. W. & W. R. R., 62 Id. 477.

³ Ballou v. Farnum, 9 Allen 47; O. & M. R. R. v. Davis, 23 Ind. 553; Bell v. I., C. & R. Ry., 53 Id. 57; Metz v. B. C. & P. R. R., 58 N. Y. 61; Rogers v. M. & O. R. R., Lea (Tenn.), 12 Am. & Eng. R. R. Cas. 442; Davis v. Duncan (U. S. C. C. So. Dist. Miss.), 17 Am. & Eng. R. R. Cas. 295; M. & L. R. R. R. v. Stringfellow, 44 Ark. 322, 21 Am. & Eng. R. R. Cas. 374; Turner v. H. & St. J. R. R., 74 Mo. 603, 6 Am. & Eng. R. R. Cas. 38.

⁴ Meara v. Holbrook, 20 Ohio St. 137; Sloan v. C. I. Ry., 62 Iowa 728, 11 Am. & Eng. R. R. Cas. 145.

the receiver's servants.¹ It has, however, been held that receivers are only liable to action within the jurisdiction authorizing them to act, and by leave of the court appointing them.² A receiver is personally liable when he voluntarily becomes lessee of a connecting line on which plaintiff is injured.³

V. THE LIABILITY OF RAILWAYS FOR MEANS OF TRANSPORTATION UNDER THE IMMEDIATE CONTROL OF THIRD PARTIES.

The railway is liable to its passengers for negligence in the construction, maintenance in repair, or operation of means of transport, which are under the immediate control of third parties.

135. This rule is applied in cases where the injury is done in an omnibus engaged by the railway to bring the passenger to its station;⁴ or, in a ferry boat operated by an independent corporation, but used by the railway to carry its passengers to their point of destination;⁵ or, on wharves and landings,⁶ and in parlor and sleeping cars.⁷

¹ Davis *v.* Duncan (U. S. C. C. So. Dist. Miss.), 17 Am. & Eng. R. R. Cas. 295.

² Cardot *v.* Barney, 63 N. Y. 281; Metz *v.* B. C. & P. Ry., 58 Id. 61; Klein *v.* Jewett, 26 N. J. Eq. 474; Barton *v.* Barbour, 104 U. S. 135. See, contra: Blumenthal *v.* Smith, 38 Vt. 402; Newell *v.* Smith, 49 Id. 260; Paige *v.* Smith, 99 Mass. 395; Nichols *v.* Smith, 115 Id. 332.

³ Kain *v.* Smith, 80 N. Y. 458, 2 Am. & Eng. R. R. Cas. 545.

⁴ Buffet *v.* T. & B. R. R., 40 N. Y. 168.

⁵ N. J. R. R. *v.* Palmer, 4 Vroom (N. J.) 90.

⁶ John *v.* Bacon, L. R. 5 C. P. 437; Knight *v.* P. S. & P. R. R., 56 Me. 234, Gruber *v.* W. & J. R. R., 92 N. C. 1, 21 Am. & Eng. R. R. Cas. 438.

⁷ Penna. Co. *v.* Roy, 102 U. S. 451; C. C. & I. Ry. *v.* Walrath, 38 Ohio St. 461, 8 Am. & Eng. R. R. Cas. 371; Kinsley *v.* R. R., 125 Mass. 54; Thorpe *v.* N. Y. C. & H. R. R. R., 76 N. Y. 402.

**VI. THE LIABILITY OF RAILWAYS FOR THE NEGLIGENCE
OF CONNECTING LINES.**

The railway is liable to one whom it has contracted to carry to a point beyond the terminus of its own line and over the line of a connecting railway for injuries done on that connecting line.

136. The question as to the liability of railways for the negligence of connecting railways seems to have been first raised in *Muschamp v. L. & P. Ry.*,¹ where the plaintiff sued for the value of a parcel which had been delivered at one of the defendant's stations for carriage to a point beyond the terminus of its line, and which was shown to have been lost after its delivery to a connecting line. Judgment was entered upon a verdict for the plaintiff. This case was followed in *Watson v. Ambergate Ry.*,² and *Scothorn v. S. S. Ry.*,³ and was cited with approval in the judgments of the House of Lords in *B. & E. Ry. v. Collins*.⁴ The converse of the proposition was ruled in the last cited case, where the plaintiff, having delivered goods at the Bath Station of the G. W. Ry. to be forwarded to Torquay over the lines of the G. W. & B. & E. Ry. Companies, and the goods having been destroyed by fire while in transit over the line of the latter company, it was held that for want of privity of contract that company was not liable for their loss. In *Mytton v. Midland Ry.*,⁵ a similar ruling was made with regard to a passenger's luggage, it being held that there was no privity of contract as between the passenger and the connecting railway, his contract being entire with the railway from whom he had bought his ticket for the transportation of himself and his luggage to the point of destination, although that point of desti-

¹ 8 M. & W. 421.

² 15 Jur. 448.

³ 8 Ex. 341.

⁴ 7 H. L. 194.

⁵ 4 H. & N. 615.

nation was upon the line of the connecting railway company. The question with regard to the liability of the contracting railway company for injuries to the person of the passenger was first raised in *G. W. Ry. v. Blake*,¹ where the plaintiff, having bought a ticket from the defendant for his transportation to Milford, the defendant's line terminating at Grange Court and their train thence proceeding over the line of the S. W. Ry., and the defendant's train while on the S. W. line having come into collision with an engine of the S. W. Company, the collision being solely due to the negligence of the servants of the S. W. Ry., the plaintiff was injured; and it was held in the Exchequer Chamber that the G. W. Ry. was liable to the plaintiff for the breach of their implied contract to use reasonable care to maintain the whole line to Milford in a condition fit for traffic. This case was followed in *Birkett v. W. H. J. Ry.*,² *Buxton v. N. E. Ry.*,³ and *Thomas v. Rhymney Ry.*,⁴ although in the first of these cases the judgment of the court might have been put upon the narrower ground that there was evidence of negligence upon the part of the defendant's servants, because the accident, although happening upon a connecting line, had been caused by the negligent displacement of a switch by a servant of the defendant company.⁵ In *Sprague v. Smith*,⁶ a contrary conclusion was reached, based upon the theory that the plaintiff, being necessarily aware that he must be exposed to the risk of injury from negligence on the part of the persons operating the line over which the defendant had contracted to carry him, must be held to have undertaken

¹ 7 H. & N. 987.

² 4 H. & N. 730.

³ L. R. 3 Q. B. 549.

⁴ L. R. 6 Q. B. 266.

⁵ See also *Murch v. C. R. R.*, 9 Foster 9; *Stetler v. C. & N. W. Ry.*, 49 Wisc. 609; *W. St. L. & P. Ry. v. Peyton*, 106 Ill. 534; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Bissell v. M. S. & N. I. R. R.*, 22 N. Y. 258.

⁶ 29 Vt. 421.

to bear that risk, as the defendant could exercise no control over the management of the other line. This case does not seem to be supported by other authority, and its reasoning cannot be regarded as satisfactory.¹ Some of the cases hold that, while a railway selling to a passenger a ticket for transportation by other railways, or other carriers, to a point beyond the terminus of its line may bind itself by contract to be liable for injuries to that passenger received upon the lines of those other railways, or carriers, yet the mere sale of the ticket does not have that effect.² Nevertheless, the weight of authority is in favour of the proposition that a railway, by contracting to deliver a passenger at a point beyond the terminus of its own line, does impliedly engage to be answerable to him for the negligence of the agents whom it employs for the purpose of performing its contract.

137. A railway is also liable to its passengers while on its line for injuries caused by negligence upon the part of another railway whose line connects with the line of the carrying railroad; as, for instance, where a passenger was injured by the negligence of a servant of the other railway in coupling its carriage to the defendant's carriage on a flying switch.³ The same principle applies where a contract of carriage having been made by the railway, the motive power is furnished by another party, and the carrier is held liable for negligence upon the part of the person furnishing the motive power.⁴

¹ See also *Hood v. N. Y. & N. H. R. R.*, 22 Conn. 1, 23 Id. 609.

² *Harlan v. E. R. R.*, 114 Mass. 44; *N. & C. R. R. v. Sprayberry*, 8 Baxt. (Tenn.) 341.

³ *White v. F. R. R.*, 136 Mass. 321, 18 Am. & Eng. R. R. Cas. 140; *Warren v. F. R. R.*, 8 Allen 227; *Eaton v. B. & L. R. R.*, 11 Id. 500.

⁴ *Peters v. Rylands*, 20 Penna. St. 497; *Keep v. I. R. R.*, 9 Fed. Rep. 625; *McLean v. Burbank*, 11 Minn. 277; *Seymour v. C. B. & Q. R. R.*, 3 Biss. 43.

VII. THE LIABILITY OF A RAILWAY FOR THE NEGLIGENCE OF OTHER RAILWAYS USING ITS LINE UNDER STATUTORY AUTHORITY.

The railway is not liable for the negligence of another railway, which, under statutory authority and without the voluntary consent of the railway, uses its line.

138. It is, however, to be borne in mind, that the carrier railway, where there has been no negligence upon its part, or upon the part of its agents or servants, is not to be held liable for an injury caused to its passenger solely by negligence on the part of another railway, which, under statutory authority, uses its line. Thus, in *Taylor v. G. N. Ry.*,¹ the defendant having been prevented from carrying the plaintiff's goods within a reasonable time by an unavoidable obstruction on its line, caused solely by the negligence of the Midland Ry., which had, under an Act of Parliament, running powers over the defendant's line, it was held that the defendant was not liable to the plaintiff for damages caused by the delay. And upon the same principle, in *Wright v. Midland Ry.*,² where the defendant had contracted to carry the passenger from Leeds to Sheffield over their own line, and a train of the L. & N. W. Ry., which had statutory running powers over the Midland line, having, without any fault upon the part of the defendant, run into the defendant's train and injured the plaintiff, it was held that the plaintiff was not entitled to recover, the ground of the decision being that the defendant was not an insurer of the safety of its passengers, but a contractor "that all persons connected with the carrying, and with the means and the appliances of

¹ L. R. 1 C. P. 385.

² L. R. 8 Ex. 137.

the carrying, with the carriages, the road, the signalling and otherwise shall use care and diligence, so that no accident may happen, but they contract no further." Where, however, the carrier railway is in any respect negligent, it is liable, although the injury was, in part, caused by negligence on the part of a railway which exercises statutory running powers over its line. Thus, in *McElroy v. N. & L. R. R.*,¹ the plaintiff, a passenger on the defendant's line, was injured by the negligent displacement of a switch by a switch-tender, the switch having been put in position, and the switch-tender being appointed, paid, and controlled by the C. R. R., which, without defendant's consent, had been empowered by statute to enter upon and connect with defendant's line; and the defendant was held liable upon the ground that the switch was a part of defendant's line, and that "it was within the scope of their duty to see that the switch was rightly constructed, attended, and managed, before they were justified in carrying passengers over it."

VIII. THE LIABILITY OF A RAILWAY FOR THE NEGLIGENCE OF OTHER RAILWAYS USING ITS LINE BY CONTRACT.

A railway, which, by contract, voluntarily permits another railway, or an individual, to run trains over its line, is liable to its passengers for the negligence of that railway or individual.

139. On the other hand, where a railway has, by contract, authorized another railway or an individual to run trains over its line, it is liable to its passengers for injuries caused by negligence on the part of that other

¹ 4 *Cush.* 400.

railway or person.¹ Upon the same principle, the railway, in *Speed v. A. & P. R. R.*,² was held liable for the negligence of a contractor to whom it had delegated its charter duty of transporting freight.

¹ I. C. R. R. *v.* Barron, 5 Wall. 90; C. & St. P. R. R. *v.* McCarthy, 20 Ill. 385; O. & M. R. R. *v.* Dunbar, Id. 623; C. & R. I. R. R. *v.* Whipple, 22 Id. 105; Nelson *v.* V. & C. R. R., 26 Vt. 717; M. & A. R. R. *v.* Mayes, 49 Ga. 355.

² 71 Mo. 303, 2 Am. & Eng. R. R. Cas. 77.

BOOK III.

THE PERSONS FOR INJURIES TO WHOM THE RAILWAY IS
LIABLE.

CHAPTER I.

CLASSIFICATION OF THE PERSONS WHO MAY BE INJURED
IN THE COURSE OF RAILWAY OPERATIONS.

140. The persons who possibly may be injured in the course of railway operations can be classified under the following categories :

I. Persons who are rightfully upon highways adjoining or crossing the railway's line or premises.

II. Persons who come upon the railway's line or premises as mere licensees.

III. Trespassers upon the railway's line, premises, or cars.

IV. Persons who, in the course of the performance of a contract based upon a valuable consideration, come upon the line, premises, or cars of the railway, including herein passengers of the railway; attendants of passengers; passengers of another railway, received for transportation in the railway's cars; passengers of another railway, whose cars are run over the line of the railway; passengers of another railway with whom a station is jointly occupied; servants of another railway while upon the line or premises of the railway in the performance of their duty to that other railway; consignors, consignees, and their agents, personally as-

sisting in the reception, carriage, or delivery of their freight; persons entering under special contract upon the railway's line or premises; post-office employés carried under a contract between the railway and the Post-Office Department, or under a statutory duty imposed upon the railway; persons carried under contract between the railway and a third party; servants of express companies whose cars are run, or whose goods are carried over the line; and persons who are carried on the line to sell refreshments, newspapers, etc., to passengers.

V. The servants of the railway, including herein such officers and employés of every grade as are engaged in the operation of the line.

The relation between the railway and the persons included in the first three categories is non-contractual, and the relation between the railway and the persons included in the last two categories is contractual.

CHAPTER II.

THE GENERAL PRINCIPLE DETERMINING THE LIABILITY OF THE RAILWAY TO THE PERSONS INCLUDED IN THE FIRST THREE CATEGORIES.

If the railway be operated without express statutory authority, it is absolutely liable for all injuries done in the course of its operation; but if it be operated under express statutory authority, it is liable only for negligence.

141. The operation of a railway, involving the rapid movement of engines and cars by the use of steam as a motive power, is a hazardous business, and, if not skillfully and carefully conducted, threatens danger to life and limb and injury to property. Its conduct, in the absence of express statutory authority for the use of its dangerous appliances, falls within that rule of law which has found its best expression in *Rylands v. Fletcher*,¹ and which holds him who keeps or uses anything essentially dangerous, *civiliter* responsible for all the damage which the thing causes, even though there be on his part neither wilful wrongdoing nor negligence.² But, as Cockburn, C. J., said in *Vaughan v. T. V. Ry*,³ "when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that, if damage

¹ L. R. 3 H. L. 330.

² *Jones v. F. Ry.*, L. R. 3 Q. B. 733; *Rylands v. Fletcher*, 3 H. & C. 774, L. R. 1 Ex. 265, L. R. 3 H. L. 330; *Stiles v. N. Co.*, 33 L. J. N. S. 311; *Oakes v. Spaulding*, 40 Vt. 347; *C. & E. Spring Co. v. Edgar*, 99 U. S. 645.

³ 5 H. & N. 685.

results from the use of such thing independently of negligence, the party using it is not responsible."¹

142. Therefore, a railway, whose construction and mode of operation, and whose use of steam as a motive power has been duly sanctioned by legislative authority, is, in case of injury caused to any individual in the course of its operations, liable only for negligence upon its part, unless it has by contract lawfully bound itself to a higher or a lower degree of liability. The character of the duty which the railway owes to the several classes of persons included in the first three categories is dependent upon the more or less rightful presence of the person in the place where he receives his injury; thus, the railway owes to travellers on the highway a high degree of duty, for their presence on the highway is rightful, while it owes to those who come on its premises, as mere licensees, a less degree of duty, for licensees are bound to take the premises as they find them, and it owes to trespassers on its line or premises no duty beyond that of abstaining from intentional injury to them, for it is not bound to anticipate the presence of, and to guard against unintentional injury to, trespassers.

¹ *Blyth v. The B. Water Works*, 11 Ex. 781; *Vaughan v. T. V. Ry.*, 5 H. & N. 685; *Rex v. Pease*, 4 B. & Ad. 30, 24 E. C. L.; *M. N. Co. v. Coons*, 6 W. & S. 101; *Henry v. P. & A. Bridge Co.*, 8 Id. 85; *O'Connor v. Pittsburgh*, 18 Penna. St. 187; *N. Y. & E. R. R. v. Young*, 33 Id. 175; *C. & P. R. R. v. Speer*, 56 Id. 325; *W. B. Canal Co. v. Mulliner*, 68 Id. 357; *Struthers v. D. W. & P. Ry.*, 87 Id. 282; *Dunn v. B. Canal Co.*, L. R. 7 Q. B. 244, 8 Id. 42; *Brand v. H. Ry.*, L. R. 1 Q. B. 130, 2 Id. 223, L. R. 4 H. L. 171; *Broughton v. M. G. W. Ry.*, 1 Ir. C. L. 169; *Dixon v. M. Board of Works*, 7 Q. B. D. 418; *P. W. & B. R. R. v. Stinger*, 78 Penna. St. 219; *F. & B. Turnpike Co. v. P. & T. R. R.*, 54 Id. 345; *Wilds v. H. R. R. R.*, 29 N. Y. 315.

CHAPTER III.

THE LIABILITY OF THE RAILWAY TO THE PERSONS INCLUDED IN THE FIRST CATEGORY, THAT IS, PERSONS WHO ARE RIGHTFULLY UPON HIGHWAYS ADJOINING OR CROSSING THE RAILWAY'S LINE OR PREMISES.

- I. The liability of the railway to travellers on the highway for traps within its own premises which endanger the safety of the travellers on the highway.
- II. The liability of the railway to travellers on the highway for its negligent construction of, or failure to repair, its buildings, etc.
- III. The liability of the railway for injuries caused to persons on the highway by the negligent operation of its line.
- IV. The liability of the railway for its negligent construction of, or failure to repair, grade crossings.
- V. The duty of the railway in the operation of its line at grade crossings.
- VI. Contributory negligence at grade crossings.

143. The first category includes those who are rightfully upon highways adjoining or crossing the railway's line or premises.

I. THE LIABILITY OF THE RAILWAY TO TRAVELLERS ON THE HIGHWAY FOR TRAPS WITHIN ITS OWN PREMISES WHICH ENDANGER THE SAFETY OF THE TRAVELLERS ON THE HIGHWAY.

The railway is liable for anything in the nature of a trap, which, although within its own premises, is yet so near to the highway as to endanger the safety of travellers on the highway.

144. A railway, like other owners and tenants of real estate, is also to be held liable for anything in the

nature of a trap, though within its own premises, but yet so near to the highway as to be dangerous to travellers on the highway. The obvious illustrations of this rule are to be found in the cases of unprotected pits and excavations dug within the railway's premises, but yet so adjacent to the highway that passers on the highway are likely, without fault on their part, to fall into them.¹

II. THE LIABILITY OF THE RAILWAY TO TRAVELLERS ON THE HIGHWAY FOR ITS NEGLIGENT CONSTRUCTION OF, OR FAILURE TO REPAIR, ITS BUILDINGS, ETC.

The railway is liable for a negligent construction or maintenance of its buildings, etc., causing injury to persons lawfully on the highway.

145. Where the railway's line or premises abut upon a public highway, the railway, like other owners or occupants of real estate, is liable to persons lawfully upon the highway for any injury caused by its negligence in the original construction of, or in its failure to maintain in repair, its line and premises.² This rule

¹ Hadley *v.* Taylor, L. R. 1 C. P. 53; Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L.; Jarvis *v.* Dean, 3 Bing. 447, 11 E. C. L.; Coupland *v.* Hardingham, 3 Camp. 398; Weller *v.* Dunk, 4 F. & F. 298; Proctor *v.* Harris, 4 C. & P. 337, 19 E. C. L.; Bush *v.* Johnston, 23 Penna. St. 209; Beatty *v.* Gilmore, 16 Id. 463; Grier *v.* Sampson, 27 Id. 183; Myers *v.* Snyder, Brightly N. P. 489; Howland *v.* Vincent, 10 Metc. 371.

² Kearney *v.* L. B. & S. C. Ry., L. R. 5 Q. B. 411, 6 Id. 759; P. & O. Canal Co. *v.* Graham, 63 Penna. St. 290; Oakland Ry. *v.* Fielding, 48 Id. 320; C. V. R. R. *v.* Hughes, 11 Id. 140; Schuylkill Nav. Co. *v.* McDonough, 33 Id. 73; Tarry *v.* Ashton, 1 Q. B. D. 314; Clark *v.* Chambers, 3 Id. 327, criticising Mangan *v.* Atterton, L. R. 1 Ex. 239; Byrne *v.* Boddle, 2 H. & C. 722; Illdidge *v.* Goodwin, 5 C. & P. 190, 24 E. C. L.: Goldthorpe *v.* Hardman, 13 M. & W. 377; Drew *v.* New River Co., 6 C. & P. 754, 25 E. C. L.; Smith *v.* West Derby Local Board, 3 C. P. D. 423; Homan *v.* Stanley, 66 Penna. St. 464; Norristown *v.* Moyer, 67 Id. 355; Rapho *v.* Moore, 68 Id. 404; Hayes *v.* Gallagher, 72 Id. 136; Stewart *v.* Alcorn, 2 Weekly Notes of Cases (Penna.) 401; Robbins *v.* Jones, 15 C. B. N. S. 221, 109 E. C. L.; Beatty *v.* C. I. Ry., 58 Iowa 242, 8 Am. & Eng. R. R. Cas. 210; Sweeny *v.* O. C. R. R., 10 Allen 368; Stewart *v.* Penna. Co., Ind., 14 Am. & Eng. R. R. Cas. 679.

has been applied in cases where the railway line is carried over a highway by a bridge.¹ Thus, in *Kearney v. L. B. & S. C. Ry.*,² the defendant, whose line crossed a highway by a bridge, was held liable to the plaintiff, who, while walking on the highway under the bridge, was injured by the falling of a brick from an abutment, the falling of the brick being considered, in the absence of explanation by the railway as to the cause of its fall, to be evidence of negligence.

146. This rule has also been applied in cases where a highway is carried over the railway line by a bridge.³ Thus, in *Manley v. St. H. Ry. & Canal Co.*,⁴ the defendant having, under statutory power, constructed its canal, and, having cut a public highway and placed there a swivel bridge, which, when moved for the passage of boats, left the highway unfenced, and, at night, also unlighted, and the plaintiff's decedent, while walking on the highway at night, having stepped into the canal and been drowned, the bridge being left open for the passage of a boat, it was held that the defendant was liable. So, in *P. & O. Canal Co. v. Graham*,⁵ the canal company being required by its charter to build and keep in repair bridges, by which highways were carried over the canal, and the plaintiff, while passing over one of these bridges, having been injured by the fall of the bridge resulting from negligence on the part of the company, it was held that the company was liable. So, in *Hurst v. Taylor*,⁶ a contractor for the construction of a railway line, who, in the course of his

¹ *Kearney v. L. B. & S. C. Ry.*, L. R. 5 Q. B. 411, 6 Id. 759; *Cooke v. B. & L. R. R.*, 133 Mass. 185.

² L. R. 5 Q. B. 411, 6 Id. 759.

³ *Manley v. St. H. Ry. & Canal Co.*, 2 H. & N. 840; *P. & O. Canal Co. v. Graham*, 63 Penna. St. 290; *Dickie v. B. & A. R. R.*, 131 Mass. 516, 8 Am. & Eng. R. R. Cas. 203; *Titcomb v. F. R. R.*, 12 Allen 254.

⁴ 2 H. & N. 840.

⁵ 63 Penna. St. 290.

⁶ 14 Q. B. D. 918.

work, had diverted a public footpath, and had left the point of divergence from the old way unguarded, and dangerous by reason of its leading on to the line, was held liable in damages to one who, at night, following the old way, was injured by falling over a bridge abutment; the ground of decision being that "a duty is cast upon those, who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion."

147. This rule has also been applied in cases where the railway line is constructed upon a highway which it is the duty of the railway to keep in repair, and which duty the railway has not performed.¹ Thus, in *Oakland Ry. v. Fielding*,² the defendant, whose line occupied a public highway, and who had negligently permitted a hole in the highway to remain unrepaired, was held liable to the plaintiff, who was injured by falling into the hole. So, where the line is constructed on a highway within the bounds of a municipality, whose ordinances, made under a legislative grant of authority, require the line to be kept clear of snow, the railway is liable for injuries done by its failure to remove the snow in a reasonable time.³ So, where the railway has permitted an engineer's stake to remain on a highway, and the plaintiff has been injured by falling over that stake while walking on the highway, the railway is liable to him in damages therefor.⁴ So, in Con-

¹ *Oakland Ry. v. Fielding*, 48 Penna. St. 320; *Rathburn v. B. & M. R. R.*, 16 Neb. 441, 19 Am. & Eng. R. R. Cas. 137; *Street R. R. v. Nolthenius*, 40 Ohio St. 376, 19 Am. & Eng. R. R. Cas. 191; *G. C. Ry. v. Nolan*, 53 Tex. 139, 3 Am. & Eng. R. R. Cas. 387.

² 48 Penna. St. 320.

³ *Bowen v. D. C. S. Ry.*, 54 Mich. 496, 19 Am. & Eng. R. R. Cas. 131.

⁴ *Gudger v. W. N. C. R. R.*, 87 N. C. 325.

lon *v.* E. R. R.,¹ the railway was held liable to one injured on a highway by the fall of a derrick used in the construction of a culvert.

III. THE LIABILITY OF THE RAILWAY FOR INJURIES CAUSED TO PERSONS ON THE HIGHWAY BY THE NEGLIGENT OPERATION OF ITS LINE.

The railway is liable to persons lawfully on the highway for injuries caused by its negligent operation of its line.

148. The railway is also liable to persons who are lawfully on the highway, if it so negligently transact its business as to render movement on the highway dangerous to passers-by; as where a passer on the highway is injured by the negligent roping of a car into a coal yard,² or by the obstruction of a highway by cars, permitted to remain at rest, blocking up a crossing;³ or by a hand car negligently left upon a highway bridge,⁴ or by the fright of horses caused by the unnecessary and excessive whistling of an engine,⁵ or by an unnecessary and excessive escape of steam from an engine,⁶ or

¹ 135 Mass. 195, 15 Am. & Eng. R. R. Cas. 99.

² N. P. R. R. *v.* Robinson, 44 Penna. St. 175.

³ Rauch *v.* Lloyd, 31 Penna. St. 358; P. R. R. *v.* Kelly, Id. 372; P. R. R. *v.* Horst, 16 Weekly Notes of Cases (Penna.) 567; Corey *v.* N. P. Ry., 32 Minn 457, 19 Am. & Eng. R. R. Cas. 352; Jackson *v.* N. C. & St. L. R. R., 13 Lea (Tenn.) 491, 19 Am. & Eng. R. R. Cas. 433; State *v.* M. & E. R. R., 25 N. J. L. 437; Ogle *v.* P. W. & B. R. R., 3 Houston 267; Young *v.* D. G. H. & M. Ry. Mich. , 19 Am. & Eng. R. R. Cas. 417.

⁴ P. C. & St L. R. R. *v.* Spanier, 85 Ind. 165, 8 Am. & Eng. R. R. Cas. 453.

⁵ P. R. R. *v.* Barnett, 59 Penna. St. 259; P. & R. R. R. *v.* Killips, 88 Id. 405; P. W. & B. R. R. *v.* Stinger, 78 Id. 219; G. R. R. *v.* Thomas, 68 Ga. 744; Culp *v.* A. & N. R. R., 17 Kans. 475; G. R. R. *v.* Newsome, 60 Ga. 492; C. B. & Q. R. R. *v.* Dickson, 88 Ill. 431; C. B. & Q. R. R. *v.* Dunn, 52 Ill. 451.

⁶ M. S. J. & A. Ry. *v.* Fullerton, 14 C. B. N. S. 54, 108 E. C. L.; L. & N. R. R. *v.* Schmidt, 81 Ind. 264, 8 Am. & Eng. R. R. Cas. 248; Gibson *v.* St. L., K. C. & N. Ry., 8 Mo. App. 488; Stott *v.* G. T. Ry., 24 Up. Can. (C. P.) 347; Borst *v.* L. S. & M. S. Ry., 66 N. Y. 639; Billmann *v.* I. C. & L. R. R., 76 Ind. 166, 6 Am. & Eng. R. R. Cas. 41; T. W. & W. Ry. *v.* Harmon, 47 Ill. 298; Geveke *v.* T. R. & I. Ry., Mich. , 22 Am. & Eng. R. R. Cas. 551.

by the fright of a horse caused by a derrick negligently permitted to remain projecting over a highway in such a manner as would naturally frighten horses,¹ or by the fright of a horse caused by a hand car left at a crossing,² or by the falling of burning coals from the fire box of an engine of an elevated railway upon the back of a horse attached to a wagon on the street under the line, and upon the hand of the driver of the wagon, thereby causing the horse to run away and preventing the driver from controlling him, the horse in running away striking the plaintiff and injuring him.³ But the railway is not liable for injuries resulting from the fright of horses on a highway caused by the mere sight of the train, or by the noises necessarily incident to its movement,⁴ nor where the fright is caused by the ordinary noise of a train in passing over a bridge;⁵ nor is the railway liable where the horses were frightened by an ordinary escape of steam from a locomotive;⁶ and in *Gilbert v. F. & P. M. Ry.*⁷ it is ruled that the fact that a car was left at a highway crossing, and that a horse was frightened, will not render the railway liable, unless it be shown that the necessary effect of leaving the car in that position was to frighten horses who were not more than usually nervous.⁸ The railway owes to persons on the highway, whose horses may be frightened by the sudden appearance

¹ *Jones v. H. R. R.*, 107 Mass. 261.

² *Vars v. G. T. Ry.*, 23 Up. Can. (C. P.) 143; *Myers v. R. & D. R. R.*, 87 N. C. 345, 8 Am. & Eng. R. R. Cas. 293; *Bussian v. M. L. S. & W. Ry.*, 56 Wisc. 325, 10 Am. & Eng. R. R. Cas. 716.

³ *Lowery v. M. Ry.*, 99 N. Y. 158.

⁴ *Hahn v. S. P. Ry.*, 51 Cal. 605; *Flint v. N. & W. R. R.*, 110 Mass. 222; *Beatty v. C. I. Ry.*, 58 Iowa 242, 8 Am. & Eng. R. R. Cas. 210; *Whitney v. M. C. R. R.*, 69 Me. 208; *Burton v. P. W. & B. R. R.*, 4 Harrington 252.

⁵ *Favor v. B. & L. R. R.*, 114 Mass. 350.

⁶ *Drayton v. N. P. R. R.*, 10 Weekly Notes of Cases (Penna.) 55; *Miller v. P. & R. R. R.*, 11 Id. 369; *Whitney v. M. C. R. R.*, 69 Me. 208.

⁷ 51 Mich. 488.

⁸ See also *P. S. Ry. v. Taylor*, 104 Penna. St. 306.

of a train, the duty of giving notice of the approach of its trains;¹ and this rule is applicable where the highway is carried over the railway by a bridge.²

149. The failure to give statutory signals of the approach of a train to a crossing is negligence as against those whose horses are frightened by the appearance of a train which has not given such signals.³

150. The place where, or the circumstances under which, the act is done may render that negligent which otherwise would not be negligent: thus, in *M. S. J. & A. Ry. v. Fullarton*,⁴ the railway was held liable to a driver waiting at a railway gate on a highway to cross a level crossing for injuries to the horses and carriage caused by his horses being frightened by an escape of steam from an engine, resulting from the act of the engine-driver in blowing off steam from the vent cocks of the engine near the railway gate. Erle, C. J., said: "it appears that the plaintiff's horses were using the road as of right, and that the company were also as of right exercising the power given them by their Act of crossing the highway, and, if there had been nothing to show that they were not exercising their rights in the ordinary way and with due and reasonable care, the company undoubtedly would not be liable for the misfortune which has happened. But I am of opinion that the evidence abundantly shows that the company, by their servants, exercised their right of crossing the highway in an inconvenient and improper manner. Whilst near the gate which separates the railway from the road, the driver blew off the steam from the mud cocks in front

¹ *Hudson v. L. & N. R. R.*, 14 Bush (Ky.) 303; *S. & P. R. R. v. Strong*, 61 Cal. 326, 8 Am. & Eng. R. R. Cas. 273.

² *P. R. R. v. Barnett*, 59 Penna. St. 259.

³ *Norton v. E. R. R.*, 113 Mass. 366; *Prescott v. Same*, Id. 370; *Pollock v. E. R. R.*, 124 Mass. 158.

⁴ 14 C. B. N. S. 54, 108 E. C. L.

of the engine, so that the plaintiff's horses became enveloped therein and frightened, and so became unmanageable. It is clear that the company have not used their railway with that attention to the rights and safety of the Queen's subjects which, under the circumstances, they were bound to exercise."¹

151. It is contributory negligence to drive a horse which is known to be afraid of locomotives on a highway adjoining a railway,² or to drive horses up to a crossing as an express train is seen to be approaching;³ or to lead a horse up to a railway crossing at which there is standing an engine, from which steam is escaping;⁴ or to drive a horse up to an obstruction at a crossing which was known to have frightened other horses,⁵ or to tie a team on a highway near a crossing;⁶ nor can a traveller on the highway recover for injuries caused by the fright of his horses when he has driven them into an apparently dangerous passage between railway cars obstructing the highway;⁷ but if the horse be known not to be afraid of engines or cars, nor to be easily frightened, it is not necessarily contributory negligence to leave him untied and unattended near a railway crossing.⁸ In any such case the question of contributory negligence is dependent upon the more or less dangerous character of the point to which the horse is driven, or where he is permitted to stand, and upon the driver's knowledge of his horse's disposition. Of course, where one drives or rides a horse up to a crossing upon the

¹ See also *Geveke v. G. R. & I. R. R.*, Mich., 22 Am. & Eng. R. R. Cas. 551.

² *P. W. & B. R. R. v. Stinger*, 78 Penna. St. 219.

³ *Rhoades v. C. & G. T. R. R.*, Mich., 21 Am. & Eng. R. R. Cas. 659.

⁴ *L. & N. R. R. v. Schmidt*, 81 Ind. 264, 8 Am. & Eng. R. R. Cas. 248.

⁵ *P. S. Ry. v. Taylor*, 104 Penna. St. 306.

⁶ *St. L. & St. F. Ry. v. Payne*, 29 Kans. 166

⁷ *Thompson v. C. L. & C. R. R.*, 54 Ind. 197

⁸ *Southworth v. O. C. & N. R. R.*, 105 Mass. 342.

invitation of a railway flagman or gate-keeper, and the horse is then frightened by a sudden escape of steam or by other noises made in the operation of the railway, the railway is liable, for the invitation of the flagman or gate-keeper is an assurance that the crossing may be safely approached.¹

IV. MAINTENANCE OF GRADE CROSSINGS.

The railway is liable for injuries caused by highway crossings negligently constructed or maintained.

152. Where the railway line is carried across a pre-existing highway, it is generally the duty of the railway to keep the crossing in repair;² and this duty includes the repairing of embankments, which are a necessary part of the crossing;³ but the railway is not bound to improve the highway so as to put it in better order than it was before the railway crossed it.⁴ The test is, whether or not the crossing, as constructed and maintained by the railway, unnecessarily impairs the usefulness of the highway and interferes with the safe enjoyment of that highway by the public;⁵ if it does, the railway has not performed its duty in the premises; if it does not, the railway has done all that it ought to be expected to do. The railway is not to be relieved from the performance of this duty, because a street rail-

¹ *Borst v. L. S. & M. S. Ry.*, 66 N. Y. 639; *P. R. R. v. Horst*, 16 Weekly Notes of Cases (Penn.) 567.

² *Farley v. C. R. I. & P. Ry.*, 42 Iowa 234; *Ferguson v. V. & T. R. R.*, 13 Nev. 184; *P. F. W. & C. Ry. v. Dunn*, 56 Penna. St. 280; *P. & E. R. R. v. Commonwealth*, 80 Ky. 147, 10 Am. & Eng. R. R. Cas. 318; *People v. C. & A. Ry.*, 67 Ill. 118; *State v. D. & S. E. R. R.*, 36 Ohio St. 436, 5 Am. & Eng. R. R. Cas. 312.

³ *Farley v. C. R. I. & P. Ry.*, 42 Iowa 234.

⁴ *Beatty v. C. I. Ry.*, 58 Iowa 242, 8 Am. & Eng. R. R. Cas. 210.

⁵ *People v. N. Y., N. H. & H. R. R.*, 89 N. Y. 266, 10 Am. & Eng. R. R. Cas. 230.

way whose line uses the highway and the crossing as a part thereof, is under a like obligation to keep the crossing in repair.¹ While, as a general rule, the railway is not bound to keep in repair the crossings of highways, which have not been legally laid out and opened,² yet, when the railway has licensed a general and public use of such a crossing, it is bound to maintain it in repair.³

153. The railway is liable to passers on the highway for a crossing so negligently constructed as to cause injuries to persons lawfully using it,⁴ for instance, for a defective planking of a crossing,⁵ or for the maintenance of its rails at such a height above the level of the crossing as to endanger the safe transit of wagons,⁶ or for an obstruction of the crossing by a wreck, provided more than a reasonably sufficient time for the removal of the wreck has elapsed.⁷

¹ Masterson *v.* N. Y. C. & H. R. R., 84 N. Y. 247, 3 Am. & Eng. R. R. Cas. 408.

² F. & P. M. Ry. *v.* Willey, 47 Mich. 88, 5 Am. & Eng. R. R. Cas. 305; M., K. & T. Ry. *v.* Long, 27 Kans. 684.

³ Kelly *v.* S. M. R. R., 28 Minn. 98, 6 Am. & Eng. R. R. Cas. 264.

⁴ Roberts *v.* C. & N. W. Ry., 35 Wis. 679; I. & St. L. R. R. *v.* Stout, 53 Ind. 143; Judson *v.* N. Y. & N. H. R. R., 29 Conn. 434; Maltby *v.* C. & W. M. Ry., 52 Mich. 108, 13 Am. & Eng. R. R. Cas. 606; L., N. A. & C. R. R. *v.* Smith, 91 Ind. 119, 13 Am. & Eng. R. R. Cas. 608.

⁵ P., F. W. & C. Ry. *v.* Dunn, 56 Penna. St. 280; Baughman *v.* S. & A. R. R., 92 Id. 335; Mann *v.* C. V. R. R., 55 Vt. 484, 14 Am. & Eng. R. R. Cas. 620; Kelly *v.* S. M. Ry., 28 Minn. 98, 6 Am. & Eng. R. R. Cas. 264; O'Connor *v.* B. & L. R. R., 133 Mass. 352, 15 Am. & Eng. R. R. Cas. 362; Penna. Co. *v.* Boylan, 104 Ill. 595, 10 Am. & Eng. R. R. Cas. 734; Payne *v.* T. & B. R. R., 83 N. Y. 572, 6 Am. & Eng. R. R. Cas. 54; Wasmer *v.* D., L. & W. R. R., 80 N. Y. 212, 1 Am. & Eng. R. R. Cas. 122.

⁶ Oliver *v.* N. E. Ry., L. R. 9 Q. B. 409; M. & C. R. R. *v.* Hunter, 11 Wisc. 160; Johnson *v.* St. P. & D. Ry., 31 Minn. 283, 15 Am. & Eng. R. R. Cas. 467.

⁷ P. S. Ry. *v.* Taylor, 104 Penna. St. 306; Paine *v.* G. T. Ry., 58 N. H. 611.

Where the railway line is laid upon a highway, travellers on that highway may rightfully cross the line at any point, and not merely at the intersection of that highway with other highways.

154. Where a highway is used as a part of a railway line, travellers on the highway have a right to cross the railway line at any point, and not merely at the intersections of other highways, and the railway is liable to one injured while crossing at a point other than the intersection of another highway, if the railway was in any respect negligent in the operation of its line;¹ and under such circumstances the railway is bound to observe, at every point of its line on the highway, the same precautions which it is bound to observe at an ordinary highway crossing.

V. THE DUTY OF THE RAILWAY IN THE OPERATION OF ITS LINE AT GRADE CROSSINGS

It is the duty of the railway to operate its line at grade crossings of highways, with due care for the rights of travellers on the highway.

155. The crossing at grade of a highway by a railway line is always objectionable. It would undoubtedly have been wise in the interests of the public, and economical in the interest of railways, if the law had required that whenever a railway line crossed a pre-existing highway, it should be the duty of the railway to carry its line over or under the highway; and whenever a newly laid out highway crossed a pre-existing railway line, it should be the duty of the municipality, borough, or county, as the case might be, to carry its highway over or under the railway line.

156. Where a railway line crosses a highway on the

¹ L., N. A. & C. R. R. v. Head, 80 Ind. 117, 4 Am. & Eng. R. R. Cas. 619; Frick v. St. L., K. C. & N. R. R., 75 Mo. 595, 8 Am. & Eng. R. R. Cas. 280; Smedis v. B. & R. B. R. R., 88 N. Y. 13, 8 Am. & Eng. R. R. Cas. 445.

level, the relative rights and obligations of the railway and of travellers on the highway are reciprocal, but it is the privilege of the railway that its trains shall have the right of way, and that all persons on the highway shall yield precedence to the trains.¹

157. It is the duty of the railway to use such reasonable precautions as will prevent collisions at such crossings, exercising to that end such care and skill as prudent and discreet persons, having the management of such a business, would use, under the circumstances, of the particular crossing. Where the line crosses a highway in or in the neighborhood of a town, and the crossing is not protected by a gate, or by the presence of a watchman, it is the duty of the railway to so moderate and control the speed of its trains that the sound of the whistle or bell of the engine will be an effectual warning to persons on the highway;² but no rate of speed, however high, is negligence *per se*.³ Nor is a railway required to run its trains at such a moderate rate of speed that they can be stopped within the distance in which obstacles on the line can be discovered at night by the headlight.⁴ Green, J., said pertinently, in *R. & C. R. R. v. Ritchie*:⁵ "The very purpose of locomotion by

¹ *P. R. R. v. Goodman*, 62 Penna. St. 329; *C. I. Co. v. Stead*, 95 U. S. 161; *Beisiegel v. N. Y. C. Ry.*, 40 N. Y. 9; *Moore v. P. W. & B. R. R.*, 16 Weekly Notes of Cases (Penna.) 53; *G. & C. R. R. v. Dill*, 22 Ill. 264; *T. & W. R. R. v. Goddard*, 25 Ind. 185; *Black v. B., C., R. & M. Ry.*, 38 Iowa 515.

² *C. I. Co. v. Stead*, 95 U. S. 161; *The State v. B. & C. R. R.*, 24 Md. 84; *Quimby v. V. C. Ry.*, 23 Vt. 387; *Wilson v. Cunningham*, 3 Cal. 241; *P. R. R. v. Long*, 75 Penna. St. 257; *Schultz v. P. R. R.*, 6 Weekly Notes of Cases (Penna.) 69; *P. R. R. v. Lewis*, 79 Penna. St. 33; *Penna. Co. v. James*, 81½ Id. 194; *P. R. R. v. Ackerman*, 74 Id. 265; *P. R. R. v. Coon*, 17 Weekly Notes of Cases (Penna.) 137.

³ *R. & C. R. R. v. Ritchie*, 102 Penna. St. 425; 19 Am. & Eng. R. R. Cas. 267; *Wallace v. St. L., I. M. & S. Ry.*, 74 Mo. 594; *Goodwin v. C. R. I. & P. R. R.*, 75 Mo. 73, 11 Am. & Eng. R. R. Cas. 460; *Powell v. M. P. Ry.*, 76 Mo. 80, 8 Am. & Eng. R. R. Cas. 467.

⁴ *L. & N. R. R. v. Milam*, 10 Tenn. 223, 13 Am. & Eng. R. R. Cas. 507.

⁵ 102 Penna. St. 425.

steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight. It is authorized by law, and a railroad company in propelling its trains at high speed along its tracks in the open country, is simply engaged in the lawful exercise of its franchise. If it is evidence of negligence that a train is run at this rate of speed, it must be because running at a less rate is a legal duty; but there is no such duty established either by statute or decisions. While there may, of course, be circumstances which require a diminished speed, it is only the force of those circumstances which creates such a duty." Whether the fact that the train, a collision with which on a highway crossing has caused the injury to the plaintiff, has approached the crossing at a rate of speed in excess of that permitted by statute, is to be regarded as negligence on the part of the railway, depends on the purview of the particular statute.

158. If the crossing be a specially dangerous one, it is negligence in the railway if its train approaches the crossing at the rate permitted by statute, provided that rate be in excess of that which a due regard to the safety of the public requires,¹ and it is for the jury to determine whether or not the rate of speed of the train be negligent, with reference to the more or less dangerous character of the crossing.²

¹ *Shaber v. St. P., M. & M. Ry.*, 28 Minn. 103, 2 Am. & Eng. R. R. Cas. 185.

² *Frick v. St. L., K. C. & N. R. R.*, 75 Mo. 595, 8 Am. & Eng. R. R. Cas. 280; *Meyer v. M. P. R. R.*, 2 Neb. 319; *Wilds v. H. R. R. R.*, 29 N. Y. 315; *Langhoff v. M. & P. du C. R. R.*, 19 Wisc. 489; *L. C. & L. R. R. v. Goetz*, 79 Ky. 442, 14 Am. & Eng. R. R. Cas. 627; *Klanowski v. G. T. Ry.*, Mich., 21 Am. & Eng. R. R. Cas. 648; *Massoth v. D. & H. C. Co.*, 64 N. Y. 531; *T. H. & I. R. R. v. Clark*, 73 Ind. 168, 6 Am. & Eng. R. R. Cas. 84; *I. & V. R. R. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. R. Cas. 237; *P., C. & St. L. Ry. v. Martin*, 82 Ind. 476, 8 Am. & Eng. R. R. Cas. 253; *Salter v. M. & B. R. R. R.*, 88 N. Y. 42, 8 Am. & Eng. R. R. Cas. 437.

159. The effect of the railway's non-performance of the duty of giving notice of the approach of its trains to a grade crossing, when that duty is regulated by statute, depends upon the terms of the particular statute, but it may be said that in general statutory directions as to giving notice of the approach of a train to a crossing must be followed, and a failure to follow them is negligence as to persons on the highway injured while crossing the line.¹

160. It has been held that such regulations, being primarily intended for the protection of persons on the highway, the failure to give the notice thereby prescribed is not negligence as to railway servants working on the line;² nor as to trespassers on the line,³ nor as to persons who, although on the highway, are not intending to cross the line;⁴ nor as to passengers in trains,⁵ nor as to travellers approaching the line on a private way,⁶ or on a blind alley;⁷ nor as to travellers approaching the line on a private way running through the railway's yard,⁸ nor as to one who ties his team on the highway near a crossing.⁹

¹ A. & W. P. R. R. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. R. Cas. 262; A. & S. R. R. v. McElmurry, 24 Ga. 75; L. I. & G. R. R. v. Rice, 10 Kans. 426; C. B. R. R. v. Phillipi, 20 Id. 12; M. P. R. R. v. Wilson, 28 Id. 639; Peart v. G. T. Ry., 10 Ont. Ap. 191, 19 Am. & Eng. R. R. Cas. 239; Faber v. St. P., M. & M. Ry., 29 Minn. 465, 8 Am. & Eng. R. R. Cas. 277; W. R. R. v. Henks, 91 Ill. 406.

² Randall v. B. & O. R. R., 109 U. S. 478.

³ Harty v. C. R. R., 42 N. Y. 468; O'Donnell v. P. & W. R. R., 6 R. I. 211; Bell v. H. & St. J. Ry., 72 Mo. 50, 4 Am. & Eng. R. R. Cas. 580.

⁴ Cordell v. N. Y. C. & H. R. R., 64 N. Y. 535; Byrne v. Same, 94 Id. 12; E. T. V. & Ga. R. R. v. Feathers, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. R. Cas. 446.

⁵ A. G. S. Ry. v. Hawk, 72 Ala. 112; L. & N. R. R. v. McKenna, 7 Lea (Tenn.) 313, 2 Am. & Eng. R. R. Cas. 114.

⁶ Johnson v. L. & N. R. R., Ky. , 13 Am. & Eng. R. R. Cas. 623.

⁷ Byrne v. N. Y. C. & H. R. R., 94 N. Y. 12.

⁸ Bennett v. G. T. Ry., 3 Ont. C. P. D. 446, 13 Am. & Eng. R. R. Cas. 627; Hodges v. St. L., K. C. & N. Ry., 71 Mo. 50, 2 Am. & Eng. R. R. Cas. 190.

⁹ St. L. & S. F. Ry. v. Payne, 29 Kans. 166, 13 Am. & Eng. R. R. Cas. 632.

161. On the other hand it has been held that the railway's omission to give the statutory signals is negligence as to persons whose horses, while on the highway, are frightened by the approach of a train;¹ and generally that the omission of such signals is negligence as to all persons, who being lawfully at or near a crossing are exposed to injury by reason of the failure to give such signals.² Indeed, the Supreme Court of Georgia has gone so far, in one case,³ as to hold that the omission of such signals is negligence in the case of injury to a horse which, having strayed upon the line, was run over at a point beyond the crossing.

162. Probably the true doctrine is that the terms of the particular statute must be first looked to in order to determine the classes of persons for whose protection the giving of the signals is prescribed, and that in subordination to the directions of the particular statute, the giving of such signals ought to be held to be intended for the protection of all persons who, being rightfully upon the highway, are injured by reason of the railway's non-performance of the statutory duty.

163. Of course, the railway may excuse its non-performance of the statutory duty by showing that the duty was, on the particular occasion, omitted within the bounds of a municipality whose ordinances lawfully enacted forbade the giving of signals within its limits.⁴ The omission of statutory signals, obviously, is not negligence to persons whose injuries are not caused by such

¹ *Cosgrove v. N. Y. C. & H. R. R.*, 87 N. Y. 88, 6 Am. & Eng. R. R. Cas. 35; *Rosenberger v. G. T. Ry.*, 8 Ont. Ap. 482, 15 Am. & Eng. R. R. Cas. 448; 9 S. C. of Can. 311, 19 Am. & Eng. R. R. Cas. 8; *Ransom v. C., St. P., M. & O. Ry.*, 62 Wisc. 178, 19 Am. & Eng. R. R. Cas. 16.

² *Wakefield v. C. & P. R. R.*, 37 Vt. 330; *Hart v. C. R. I. & P. Ry.*, 56 Iowa 166.

³ *W. & A. R. R. v. Jones*, 65 Ga. 631, 8 Am. & Eng. R. R. Cas. 267.

⁴ *Penna. Co. v. Hensil*, 70 Ind. 569, 6 Am. & Eng. R. R. Cas. 79.

omissions, as where a boy who sees an approaching train attempts to pass in front of it, and catching his foot under the rail is held and run over;¹ or where a man sees the smoke of an engine, but heedlessly assumes that it is moving from instead of approaching the crossing.²

164. There are some authorities for the proposition that when the railway has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises;³ but the sounder doctrine would seem to be that compliance with such statutory regulations does not necessarily relieve the railway from the necessity of taking such additional precautions as are essential to the safety of passers on the highway.⁴

165. Even when there is no statutory requirement as to notice of a train's approach to a crossing, a railway is negligent if due notice be not given of the approach of its trains to a level crossing, and it is for the jury to determine what notice is reasonable, under the circumstances, of the particular crossing.⁵

166. The same principles are applicable to the railway's non-performance of a statutory duty of erecting sign-

¹ *Pakalinsky v. N. Y. C. & H. R. R.*, 82 N. Y. 424, 2 Am. & Eng. R. R. Cas. 251; *Cf. L., N. A. & C. R. R. v. Head*, 80 Ind. 117, 4 Am. & Eng. R. R. Cas. 619.

² *Purl v. St. L., K. C. & N. Ry.*, 72 Mo. 168, 6 Am. & Eng. R. R. Cas. 27.

³ *C. B. & Q. R. R. v. Dougherty*, 110 Ill. 521, 19 Am. & Eng. R. R. Cas. 292; *C. & A. R. R. v. Robinson*, 106 Ill. 142, 13 Am. & Eng. R. R. Cas. 620; *Beisiegel v. N. Y. C. Ry.*, 40 N. Y. 9; *Grippen v. Same*, Id. 34.

⁴ *Richardson v. N. Y. C. Ry.*, 45 N. Y. 846; *Bradley v. B. & M. Ry.*, 2 Cush. 539; *Barry v. N. Y. C. & H. R. R. R.*, 92 N. Y. 289, 13 Am. & Eng. R. R. Cas. 615; *Eaton v. F. R. R.*, 129 Mass. 364, 2 Am. & Eng. R. R. Cas. 183.

⁵ *Tolman v. S., B. & N. Y. R. R.*, 98 N. Y. 198; *P. R. R. v. Ogier*, 35 Penna. St. 60; *P. & T. R. R. v. Hagan*, 47 Id. 244; *Longenecker v. P. R. R.*, 105 Id. 328; *Loucks v. C. M. & St. P. Ry.*, 31 Minn. 526, 19 Am. & Eng. R. R. Cas. 305; *P. F. W. & C. R. R. v. Dunn*, 56 Penna. St. 280; *Renwick v. N. Y. C. R. R.*, 36 N. Y. 132; *O'Mara v. H. R. R. R.*, 38 N. Y. 445; *Guggenheim v. L. S. & M. S. Ry.*, Mich., 22 Am. & Eng. R. R. Cas. 546; *Kelly v. St. P., M. & M. Ry.*, 29 Minn. 1, 6 Am. & Eng. R. R. Cas. 93.

boards at a level crossing,¹ but the failure of the railway to maintain sign-boards at a crossing is not negligence as to persons who, in fact, know of the existence and the location of the crossing.²

167. There is no rule of law which requires railways, when not so required by statute, to maintain gates at all crossings,³ nor flagmen at all crossings;⁴ but, if it be proven that the crossing, at which occurred the injury sued for, is of such a character that the posting of a flagman was necessary to the safety of travellers on the highway, and would have prevented the particular injury, the jury may then find negligence on the part of the railway in its failure to post a flagman there.⁵ Where a railway does employ a flagman at a crossing, his failure to perform the duties of his post is negligence on the part of the railway.⁶ And the withdrawal of the flagman by the railway, without notice to the public, is negligence on the part of the railway;⁷ but whatever be the character of the crossing, the failure to post a flagman is not negligence as to persons whose injuries are not due to the absence of the flagman.⁸

168. Where a railway has, in obedience to statutory requirements, erected gates at a level crossing, the fact

¹ *Shaber v. St. P., M. & M. R. R.*, 28 Minn. 103, 2 Am. & Eng. R. R. Cas. 185.

² *Haas v. G. R. & I. R. R.*, 47 Mich. 401, 8 Am. & Eng. R. R. Cas. 268.

³ *Stubley v. L. & N. W. Ry.*, L. R. 1 Ex. 13.

⁴ *Beisiegel v. N. Y. C. R. R.*, 40 N. Y. 9; *M. C. R. R. v. Neubeur*, 62 Md. 391, 19 Am. & Eng. R. R. Cas. 261; *Foy v. P., W. & B. R. R.*, 47 Md. 76; *P. R. R. v. Matthews*, 36 N. J. L. 531; *McGrath v. N. Y. C. & H. R. R. R.*, 59 N. Y. 468, 63 Id. 522; *Pakalinsky v. N. Y. C. & H. R. R. R.*, 82 N. Y. 424, 2 Am. & Eng. R. R. Cas. 251; *Weber v. N. Y. C. R. R.*, 58 N. Y. 459.

⁵ *Welsch v. H. & St. J. R. R.*, 72 Mo. 551, 6 Am. & Eng. R. R. Cas. 75; *Kinsey v. Crocker*, 18 Wise. 74; *K. P. Ry. v. Richardson*, 25 Kans. 391, 6 Am. & Eng. R. R. Cas. 96; *Eaton v. F. R. R.*, 129 Mass. 364, 2 Am. & Eng. R. R. Cas. 183.

⁶ *Kessenger v. N. Y. & H. R. R.*, 56 N. Y. 543; *Sweeney v. O. C. & N. R. R.*, 10 Allen (Mass.) 368; *Dolan v. D. & H. C. Co.*, 71 N. Y. 285.

⁷ *P. C. & St. L. R. R. v. Yundt*, 78 Ind. 373, 3 Am. & Eng. R. R. Cas. 502.

⁸ *Penna. Co. v. Hensil*, 70 Ind. 569, 6 Am. & Eng. R. R. Cas. 79.

that the gates are open is an invitation to cross, and an assurance that the line can be safely crossed;¹ and when the railway's gate-keeper, flagman, or train hand invites a traveller on the highway to cross the line, the traveller is not bound to exercise the same degree of care which he would be expected to exercise if no such invitation were given;² but such an invitation by a servant of the railway will not excuse a failure by the injured person to exercise any care for his own safety.³ It is the duty of gatemen to close the gates when a train approaches a crossing, and the railway is not liable to a traveller on the highway who is injured while attempting to drive across the line before a moving train, by the wheel of his carriage being caught in the closing gate.⁴

169. It has been held that the failure of the railway to perform a self-imposed duty is not negligence; thus, where a railway, at a level crossing for foot passengers, had voluntarily erected swing gates, and usually locked the gates when a train was approaching, the fact that on a particular occasion the gates were not locked, was held not to be such negligence as rendered the railway liable for the death of a person who walked on the line at the crossing and was run over.⁵ On the other hand, in *P. & R. R. R. v. Killips*,⁶ a jury were permitted to find a railway negligent in that, having voluntarily maintained a watchman and gates at a crossing of its line by a city street, the gates were open and no watchman in attendance at a time when the plaintiff's dece-

¹ *Stapley v. L. B. & S. C. Ry.*, L. R. 1 Ex. 21; *Wanless v. N. E. Ry.*, L. R. 6 Q. B. 481; *Sharp v. Glushing*, 96 N. Y. 676, 19 Am. & Eng. R. R. Cas. 372.

² *Lunt v. L. & N. W. Ry.*, L. R. 1 Q. B. 277.

³ *P. & R. R. R. v. Boyer*, 97 Penna. St. 91, 2 Am. & Eng. R. R. Cas. 172.

⁴ *Peck v. N. Y., N. H. & H. R. R.*, 50 Conn. 379.

⁵ *Skelton v. L. & N. W. Ry.*, L. R. 2 C. P. 631. See also *Cliff v. M. Ry.*, L. R. 5 Q. B. 258; *McGrath v. N. Y. C. & H. R. R. R.*, 59 N. Y. 468, 63 Id. 522.

⁶ 88 Penna. St. 413.

dent, driving a horse on the street, was killed by being thrown from his carriage in consequence of his horse being frightened by the sudden appearance of an engine, and by its excessive whistling.¹ So, the railway has been held liable, when, under circumstances of danger, the invitation to cross was given by its servant, who, while employed to perform other duties at the crossing, had, for several years, voluntarily assumed the duty of warning persons not to cross the line when trains were approaching.² Probably the right doctrine is, that if the particular precaution, although self imposed by the railway, has been observed for so long a time, that travellers on the highway have become accustomed to rely on it as a means of protection to them, then, and then only, its discontinuance ought to be regarded as negligence on the part of the railway.

170. Where the surrounding circumstances render the crossing specially dangerous to travellers on the highway, as where the line is curved, or there are obstructions to the view, it is the duty of the railway to take precautions commensurate to the danger, and it is for the jury to determine whether or not the absence of any particular precaution is negligence.³

171. It is a duty incumbent on the railway to cause

¹ See, also, P. C. & St. L. Ry. v. Yundt, 78 Ind. 373, 3 Am. & Eng. R. R. Cas. 502.

² Peck v. M. C. R. R., Mich., 19 Am. & Eng. R. R. Cas. 257.

³ James v. G. W. Ry., L. R. 2 C. P. 634, note; Bilbee v. L. B. & S. C. Ry., 18 C. B. N. S. 584, 114 E. C. L.; Ford v. L. & S. W. Ry., 2 F. & F. 730; Stapley v. L. & N. W. Ry., L. R. 1 Ex. 13; Stapley v. L. B. & S. C. Ry., Id. 21; Cliff v. M. Ry., L. R. 5 Q. B. 258; C. R. R. r. Feller, 84 Penna. St. 226; C. I. Co. v. Stead, 95 U. S. 161; Mackay v. N. Y. C. R. R., 35 N. Y. 75; Richardson v. Same, 45 Id. 846; P. R. R. v. Matthews, 36 N. J. L. 531; Funston v. C. R. I. & P. Ry., 61 Iowa 452, 14 Am. & Eng. R. R. Cas. 640; Nehrbas v. C. P. R. R., 62 Cal. 320, 14 Am. & Eng. R. R. Cas. 370; Thomas v. D. L. & W. R. R., 19 Blatchford 533; Roberts v. C. & N. W. Ry., 35 Wise. 679; Eilert v. G. B. & M. R. R., 48 Wise. 606; Dimick v. C. & N. W. Ry., 80 Ill. 338; P. P. & J. R. R. v. Siltinan, 88 Ill. 529.

its trains to approach and pass the crossing with care. The performance of this duty requires, as before stated, notice to travellers on the highway of the existence and location of the crossing, and of the trains' approach thereto, and such a rate of speed of the train as, under the conditions of the crossing, is prudent with regard to travellers on the highway. The performance of this duty also requires a careful operation of the line in other respects: thus, trains should not pass each other at speed on the crossing;¹ extraordinary precautions should be taken if a train or an engine is to be backed over a crossing;² and especially must the greatest care be observed, if cars are to be kicked, or sent on a flying switch over a crossing;³ but the backing of a train or engine over a crossing, or the passing of a crossing by cars on a flying switch, cannot properly be said to be negligent, if precautions commensurate with the danger are observed by the railway.⁴

172. It is the duty of the railway to adequately light its engines and cars at night, that its servants thereon may be enabled to see obstructions, animate and inani-

¹ *West v. N. J. R. R.*, 3 Vroom 91.

² *Hutchinson v. St. P., M. & M. Ry.*, 32 Minn. 398, 19 Am. & Eng. R. R. Cas. 280; *Maginnis v. N. Y. C. R. R.*, 52 N. Y. 215; *Kissinger v. N. Y. & H. R. R.*, 56 N. Y. 538; *S. & M. R. R. v. Shearer*, 58 Ala. 672; *Johnson v. St. P. & D. Ry.*, 31 Minn. 283, 15 Am. & Eng. R. R. Cas. 467; *Levoy v. M. Ry.*, 3 Ont. 623, 15 Am. & Eng. R. R. Cas. 478; *Howard v. St. P., M. & M. Ry.*, 32 Minn. 214, 19 Am. & Eng. R. R. Cas. 283.

³ *Troutman v. P. & R. R. R.*, 11 Weekly Notes of Cases (Penna.) 455; *Kay v. P. R. R.*, 65 Penna. St. 269; *Ferguson v. W. C. Ry.*, 63 Wise. 145, 19 Am. & Eng. R. R. Cas. 285; *Howard v. St. P., M. & M. Ry.*, 32 Minn. 214, 19 Am. & Eng. R. R. Cas. 283; *Butler v. M. & St. P. Ry.*, 28 Wise. 487; *Brown v. N. Y. C. R. R.*, 32 N. Y. 600; *P. R. R. v. State to use of McGirr*, 61 Md. 108, 19 Am. & Eng. R. R. Cas. 326; *I. C. R. R. v. Baehas*, 55 Ill. 379; *C. R. I. & P. R. R. v. Dignan*, 56 Ill. 487; *Stillwell v. C. R. R.*, 34 N. Y. 29; *C. & A. R. R. v. Garvey*, 58 Ill. 83.

⁴ *Bohan v. M., L. S. & W. Ry.*, 58 Wisc. 30, 15 Am. & Eng. R. R. Cas. 374; 61 Wisc. 391, 19 Am. & Eng. R. R. Cas. 276; *Hogan v. C. M. & St. P. Ry.*, 59 Wisc. 139, 15 Am. & Eng. R. R. Cas. 439.

mate, upon the line at as great a distance as possible, by the use of the best appliances in practical use;¹ but the railway is not to be held liable for injuries that result, without negligence on its part, from the light becoming obscured by the operation of natural causes, as where the headlight of a locomotive became so obscured by a driving mist that an obstruction on the line could not be seen by the engine-driver.² It is also the duty of the railway to have its trains adequately equipped with brakes, and manned by a sufficient number of hands to promptly control the movement of the train, thus, it has been held to be negligence in the railway to permit an engine to pass a crossing without an engine-driver and under the sole control of a fireman.³ However questionable may be that decision, there is no doubt that the servants on the train must be vigilant and attentive to their duties when the train approaches a crossing;⁴ and the presence of strangers in the cab of the engine as it approaches a crossing, may, properly, be held to be negligence on the part of the railway, on the ground that their presence diverts the attention of the engine-driver and fireman, when their attention should be concentrated on the performance of their duties.⁵

¹ N. & C. R. R. v. Smith, 6 Hiesk. 174; Smedis v. B. & R. B. R. R., 88 N. Y. 13, 8 Am. & Eng. R. R. Cas. 445.

² L. & N. R. R. v. Melton, 2 Lea (Tenn.) 262.

³ O'Marra v. H. R. R. R., 38 N. Y. 445.

⁴ St. L. & S. E. Ry. v. Matthias, 50 Ind. 65; Frick v. St. L., K. C. & N. Ry., 75 Mo. 595, 8 Am. & Eng. R. R. Cas. 280.

⁵ Marcott v. M., H. & O. Ry., 47 Mich. 1, 4 Am. & Eng. R. R. Cas. 548.

VI. CONTRIBUTORY NEGLIGENCE AT GRADE CROSSINGS.

It is the duty of travellers on the highway, when approaching a grade crossing, to exercise a prudent care for their own safety, and to that end to look and listen, in order to satisfy themselves that it is safe to cross the line.

173. It is the duty of travellers upon the highway, whether on foot, or mounted, or in wagons, to exercise a care for their own safety in approaching the line, and especially to look and listen before attempting to cross the line.¹ This rule is also applicable to horse cars crossing the lines of steam railways, and it is the duty of the drivers of such cars to look and listen before crossing the line.² But where the testimony as to the plaintiff's failure to look and listen, or, in other respects, to exercise care, is contradictory, the question is, of course, for the jury.³

174. There are many authorities for the proposition, that where the plaintiff's case shows that the person injured did not look and listen before crossing the line, it is the duty of the judge to nonsuit the plaintiff or to direct a verdict for the defendant.⁴ Other authorities

¹ N. P. R. R. v. Heilman, 49 Penna. St. 60; C. R. I. & P. R. R. v. Houston, 95 U. S. 697; State v. M. C. R. R., 76 Me. 357, 19 Am. & Eng. R. R. Cas. 312; P. R. R. v. State, to use of McGirr, 61 Md. 108, 19 Am. & Eng. R. R. Cas. 326; Parker v. W. & W. R. R., 86 N. C. 221, 8 Am. & Eng. R. R. Cas. 420; Butterfield v. W. R. R., 10 Allen 532; Haslan v. M. & E. R. R., 4 Vroom 147; Peck v. N. Y., N. H. & H. R. R., 50 Conn. 379, 14 Am. & Eng. R. R. Cas. 633; G. H. & S. A. Ry. v. Bracken, 57 Tex. 71, 14 Am. & Eng. R. R. Cas. 691; Pence v. C. R. I. & P. Ry., 63 Iowa 746, 19 Am. & Eng. R. R. Cas. 366; Kelley v. H. & St. J. R. R., 75 Mo. 138, 13 Am. & Eng. R. R. Cas. 638.

² P. & R. R. R. v. Boyer, 97 Penna. St. 91, 2 Am. & Eng. R. R. Cas. 172; Mantel v. C. M. & St. P. Ry., M., St. Ry. v. Same, 33 Minn. 62, 19 Am. & Eng. R. R. Cas. 362.

³ Shaw v. Jewett, 86 N. Y. 616, 6 Am. & Eng. R. R. Cas. 111; H. R. R. v. Coyle, 55 Penna. St. 396; Hoye v. C. & N. W. Ry., 62 Wisc. 666, 19 Am. & Eng. R. R. Cas. 347; P. R. R. v. Bock, 93 Penna. St. 427, 6 Am. & Eng. R. R. Cas. 20.

⁴ P. R. R. v. Beale, 73 Penna. St. 504; C. R. R. v. Feller, 84 Id. 226; Schultz v. P. R. R., 6 Weekly Notes of Cases (Penna.) 69; Gerety v. P. W. &

hold that it is for the jury to decide whether, under the circumstances, the plaintiff's failure to look and listen was such contributory negligence as should defeat his recovery.¹ It is held, in another line of authorities, that only where the plaintiff's case discloses a failure to look and listen before crossing, or otherwise to exercise care for his own safety, when the view of the line was unobstructed, and there were no circumstances to perturb his judgment or impede his action, is the court

B. R. R., 81 Penna. St. 274; C. R. I. & P. R. R. v. Houston, 95 U. S. 697; Schofield v. C. M. & St. P. Ry., 114 U. S. 615; Carroll v. P. R. R., 12 Weekly Notes of Cases (Penna.) 348; M. C. R. R. v. Neubeur, 62 Md. 391, 19 Am. & Eng. R. R. Cas. 261; R. & C. R. R. v. Ritchie, 102 Penna. St. 405, 19 Am. & Eng. R. R. Cas. 267; B. & O. R. R. v. Hobbs, Md. , 19 Am. & Eng. R. R. Cas. 337; U. P. Ry. v. Adams, 33 Kans. 427, 19 Am. & Eng. R. R. Cas. 376; Moore v. P., W. & B. R. R., 16 Weekly Notes of Cases (Penna.) 53; Tully v. F. R. R., 134 Mass. 499, 14 Am. & Eng. R. R. Cas. 682; L. S. & M. S. Ry. v. Miller, 25 Mich. 274; Mahlen v. L. S. & M. S. Ry., 49 Mich. 585, 14 Am. & Eng. R. R. Cas. 687; Powell v. M. P. Ry., 76 Mo. 80, 8 Am. & Eng. R. R. Cas. 467; Wright v. B. & M. R. R., 129 Mass. 440, 2 Am. & Eng. R. R. Cas. 121; Haas v. G. R. & I. R. R., 47 Mich. 401, 8 Am. & Eng. R. R. Cas. 268; Henze v. St. L., K. C. & N. R. R., 71 Mo. 636, 2 Am. & Eng. R. R. Cas. 212; P. R. R. v. Righter, 42 N. J. 180, 2 Am. & Eng. R. R. Cas. 220; Turner v. H. & St. J. R. R., 74 Mo. 603, 6 Am. & Eng. R. R. Cas. 38.

¹ C. I. Co. v. Stead, 95 U. S. 161; Hutchinson v. St. P., M. & M. Ry., 32 Minn. 393, 19 Am. & Eng. R. R. Cas. 280; Tyler v. N. Y. & N. E. R. R., 137 Mass. 238, 19 Am. & Eng. R. R. Cas. 297; Bower v. C. M. & St. P. Ry., 61 Wisc. 457, 19 Am. & Eng. R. R. Cas. 301; Loucks v. C. M. & St. P. Ry., 31 Minn. 526, 19 Am. & Eng. R. R. Cas. 305; Shaber v. St. P., M. & M. R. R., 28 Minn. 103, 2 Am. & Eng. R. R. Cas. 185; Funston v. C., R. I. & P. Ry., 61 Iowa 452, 14 Am. & Eng. R. R. Cas. 640; Spencer v. I. C. R. R., 29 Iowa 55; Davis v. N. Y. C. & H. R. R. R., 47 N. Y. 400; Renwick v. N. Y. C. R. R., 36 N. Y. 132; Duffy v. C. & N. W. Ry., 32 Wisc. 269; Eagan v. F. R. R., 101 Mass. 315; T. H. & I. R. R. v. Clark, 73 Ind. 168, 6 Am. & Eng. R. R. Cas. 84; P. C. & St. L. Ry. v. Martin, 82 Ind. 476, 8 Am. & Eng. R. R. Cas. 253; Kelly v. St. P., M. & M. Ry., 29 Minn. 1, 6 Am. & Eng. R. R. Cas. 93; C. & N. W. Ry. v. Dimick, 96 Ill. 42, 2 Am. & Eng. R. R. Cas. 201; C. & N. W. Ry. v. Miller, 46 Mich. 532, 6 Am. & Eng. R. R. Cas. 89; Plummer v. E. R. R., 73 Me. 591, 6 Am. & Eng. R. R. Cas. 165; Moore v. C. R. R., 47 Iowa 688; Laverenz v. C., R. I. & P. Ry., 56 Iowa 689, 6 Am. & Eng. R. R. Cas. 274; Bonnell v. D., L. & W. R. R., 39 N. J. L. 189; Randall v. C. R. R. R., 132 Mass. 269; Stackus v. N. Y. C. & H. R. R. R., 79 N. Y. 464; Kellogg v. N. Y. C. & H. R. R. R., 79 N. Y. 72; Shaw v. Jewett, 86 N. Y. 616; Greany v. L. I. R. R., 101 N. Y. 419.

authorized in entering a nonsuit, or directing a verdict; but that, under other circumstances, it is for the jury to determine the measure of the duty of the person injured.¹

175. There does not, however, seem to be any sound reason why any different rule should be enforced by the courts in cases of crossing accidents from that which prevails in all other actions grounded upon negligence, and in which contributory negligence is available as a defence. There is, in every case, a preliminary question for the judge to determine, and that is, whether, assuming the truth of the testimony and all the inferences that legitimately can be drawn from it, the jury would, as reasonable men, be justified in finding a verdict in favour of the party on whom the burden of proof rests. The application of that rule of procedure would leave to the jury the question of the effect of the failure of the injured person to look and listen, except in those cases where that failure, being proven or conceded as a fact by the plaintiff's case, was so obviously a contributory cause of the plaintiff's injury, and so incontrovertibly negligent that a jury of reasonable men would not be justified in finding a verdict for the plaintiff. The hard and fast rule, first enunciated in the Pennsylvania cases, that under all circumstances the person injured must "stop, look, and listen" before crossing a railway line, has no statutory basis, and is really a judicial usurpation of the function of the jury, for there are conceivable cases in which the person injured might justifiably go upon the railway's line without pausing to "stop, look, and listen," as, for instance, when a flag-

¹ *Laverenz v. C. R. I. & P. Ry.*, 56 Iowa 689, 6 Am. & Eng. R. R. Cas. 274; *Carlin v. C. R. I. & P. Ry.*, 37 Iowa 316; *Benton v. C. R. R.*, 42 Iowa 192; *Artz v. C. R. I. & P. Ry.*, 34 Iowa 153; *Connelly v. N. Y. C. & H. R. R. R.*, 88 N. Y. 346, 8 Am. & Eng. R. R. Cas. 459; *N. C. Ry. v. State, to use of Burns*, 54 Md. 113, 6 Am. & Eng. R. R. Cas. 66.

man invites him to cross, or when a gate protecting the crossing stands open, or when the view of the line is so obstructed that nothing can be seen, and a storm of such severity is raging that no sounds incident to the movement of trains could possibly be heard. The Pennsylvania rule also goes further than that in most other jurisdictions, in that it requires the person injured not only to "look and listen," but also to "stop;" yet, in most cases, one who approaches the crossing of a railway line can effectually care for his safety by looking and listening, without stopping.

176. There is, of course, no doubt that he is contributorily negligent who attempts to cross a railway when he sees or hears that a train is moving towards the crossing.¹

177. Where the view of the line from the highway is obstructed, or the crossing is in other respects specially dangerous, it is the duty of the traveller to exercise a higher degree of care, and if he cannot, by looking and listening, satisfy himself that it is prudent to cross the line, he must stop,² or he must adopt such other precautions as ought to be taken under the particular circumstances of the case; thus, where the view of the line is obstructed it may be the duty of a traveller in a wagon to get out and lead his horse up to and over the crossing;³ yet, in *P. R. R. v. Ackerman*,⁴ a traveller before sunrise on a foggy morning having approached the line at a level crossing, there being snow on the line which deadened the sound of the train, stopped his wagon about ten steps from the line, where his view was

¹ *Grows v. M. C. R. R.*, 67 Me. 100; *C. R. I. & P. Ry. v. Bell*, 70 Ill. 102; *Gothard v. A. G. S. R. R.*, 67 Ala. 114.

² *Schaefer v. C. M. & St. P. Ry.*, 62 Iowa 624, 14 Am. & Eng. R. R. Cas. 696; *Haas v. G., R. & I. Ry.*, 47 Mich. 401, 8 Am. & Eng. R. R. Cas. 268; *Cordell v. N. Y. C. & H. R. R. R.*, 64 N. Y. 535, 70 Id. 119.

³ *P. R. R. v. Beale*, 73 Penna. St. 504.

⁴ 74 Penna. St. 265.

obstructed by cars on a siding, and after looking and listening, without seeing or hearing any train, drove upon the line and was struck by a train which had given no warning of its approach, and it was held that the traveller had performed his whole duty in the premises. Where one track of a double tracked line is obstructed at a crossing by either a stationary or a moving train, it is contributory negligence for a passenger to go upon the line without looking up and down the other line of rails.¹

178. The rule under consideration has no application to cases where the plaintiff's failure to stop, look, and listen was not a proximate cause of the injury, as where the plaintiff was injured because a cork of his horse's shoe was caught and held in a crevice between the planks on the crossing.²

179. The non-performance by the person injured of the duty of approaching the crossing with care will not be excused by the fact that the train, by collision with which he was injured, was a special train;³ nor that the train was behind time;⁴ nor that there was a failure on the part of the railway to give notice of the approach of the train to the crossing;⁵ nor that the train was run-

¹ *Stapley v. L., B. & S. C. Ry.*, L. R. 1 Ex. 21; *Skelton v. L. & N. W. Ry.*, L. R. 2 C. P. 361; *Carroll v. P. R. R.*, 12 Weekly Notes of Cases (Penna.) 348; *Pencee v. C. R. I. & P. Ry.*, 63 Iowa 746, 19 Am. & Eng. R. R. Cas. 366.

² *Baughman v. S. & A. R. R.*, 92 Penna. St. 335.

³ *Schofield v. C. M. & St. P. Ry.*, 114 U. S. 615, 19 Am. & Eng. R. R. Cas. 353.

⁴ *Salter v. U. & B. R. R. R.*, 75 N. Y. 273; *The State v. P., W. & B. R. R.*, 47 Md. 76.

⁵ *Davey v. L. & S. W. Ry.*, 11 Q. B. D. 213, 12 Id. 73; *C., R. I. & P. R. R. v. Houston*, 95 U. S. 697; *I. & G. N. Ry. v. Jordan*, Tex. , 10 Am. & Eng. R. R. Cas. 301; *C. & R. I. R. R. v. McKean*, 40 Ill. 218; *Kelley v. H. & St. J. R. R.*, 75 Mo. 138, 13 Am. & Eng. R. R. Cas. 638; *W., St. L. & P. Ry. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; *U. P. Ry. v. Adams*, 33 Kans. 427, 19 Am. & Eng. R. R. Cas. 376; *Henze v. St. L., K. C. & N. Ry.*, 71 Mo. 636, 2 Am. & Eng. R. R. Cas. 212; *P. R. R. v. Righter*, 42 N. J. 180, 2

ning at a rate of speed in excess of that permitted by a municipal ordinance;¹ nor that an engine at night had a train hand's lantern hung in front of it instead of an ordinary headlight.²

180. It may, however, not unreasonably be considered that the railway's non-performance of its duty in this respect ought to have the effect of relieving the plaintiff of the necessity of exercising as high a degree of care as would have been incumbent on him if the railway had performed its duty in the premises;³ thus, it has been held that, where in the making of a flying switch over a highway crossing, the engine has passed the crossing, a person on the highway is not bound to anticipate the coming of the detached cars, and it is for the jury to determine whether he is negligent in going upon the line without looking and listening.⁴ It has also been held that the failure of the servants of the railway to give due notice of the approach of a train to a station or a level crossing (as, for instance, by neglecting to whistle or to sound the engine bell) may put to sleep the vigilance of a traveller approaching the station or the crossing, and may relieve him of the necessity of stopping to look and listen before going upon the line;⁵ and in *D., W. & W. Ry. v. Slattery*,⁶ it was held that the neglect of the driver of a lighted express train in

Am. & Eng. R. R. Cas. 220; *Shaw v. Jewett*, 86 N. Y. 616, 6 Am. & Eng. R. R. Cas. 111; *C. & N. W. Ry. v. Sweeney*, 52 Ill. 325; *Rothe v. M. & St. P. Ry.*, 21 Wisc. 256.

¹ *Kelley v. H. & St. J. R. R.*, 75 Mo. 138, 13 Am. & Eng. R. R. Cas. 638.

² *Mahlen v. L. S. & M. S. Ry.*, 49 Mich. 585, 14 Am. & Eng. R. R. Cas. 687.

³ *W., St. L. & P. Ry. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; *Gaynor v. O. C. & N. Ry.*, 100 Mass. 208; *Chaffee v. L. R. R.*, 104 Id. 108; *Copley v. N. H. & N. Co.*, 136 Id. 6, 19 Am. & Eng. R. R. Cas. 373; *Ernst v. H. R. R.*, 39 N. Y. 61.

⁴ *Butler v. M. & St. P. Ry.*, 28 Wisc. 487; *Ferguson v. W. C. Ry.*, 63 Wisc. 145, 19 Am. & Eng. R. R. Cas. 285.

⁵ *P. R. R. v. Ogier*, 35 Penna. St. 60; *P. & T. R. R. v. Hagan*, 47 Id. 244.

⁶ 3 App. Cas. 1155.

not whistling when approaching a station at night was *causa causans* of injury to a person who, having crossed behind a stationary train, had come on the line without looking and been run over.

181. Even if the person injured has been contributorily negligent in heedlessly going upon the line, the railway will nevertheless be liable to him, under the rule in *Davies v. Mann*, if the railway servants, having discovered his perilous situation in time to stop the train before striking him, negligently fail to stop it.¹

182. It is held in some jurisdictions, that, in the absence of proof, the presumption is that the person injured did look and listen, or in other words, that he was not contributorily negligent,² but this presumption is rebutted when testimony to the contrary has been adduced on the part of the railway, and in such a case the jury should be directed that if they believe that testimony, they should find for the railway.³ In other jurisdictions it is held that where it is proven that the decedent, being possessed of ordinary faculties and intelligence, was struck at a level crossing by a moving and lighted train, the presumption is that he was contributorily negligent in not looking and listening, for if he had looked and listened he must have seen the train, and he would not have been struck.⁴ Of course this last-mentioned presumption has no application to a case where, if the person injured had looked and listened, he could not in all probability have seen or heard any warning of danger,

¹ *Kean v. B. & O. R. R.*, 61 Md. 154, 19 Am. & Eng. R. R. Cas. 321; *Strong v. P. R. R.*, 61 Cal. 326, 8 Am. & Eng. R. R. Cas. 273; *Kelley v. H. & St. J. R. R.*, 75 Mo. 138, 13 Am. & Eng. R. R. Cas. 638.

² *C. V. R. R. v. Hall*, 61 Penna. St. 361; *C. & P. R. R. v. Rowan*, 66 Id. 393; *P. R. R. v. Weber*, 76 Id. 157; *Weiss v. P. R. R.*, 79 Id. 387, 87 Id. 447; *P. R. R. v. Fortney*, 90 Id. 323; *Schum v. P. R. R.*, 107 Id. 8.

³ *R. & C. R. R. v. Ritchie*, 102 Penna. St. 425.

⁴ *Tolman v. S. B. & N. Y. R. R.*, 98 N. Y. 198; *Chase v. M. C. R. R.*, 77 Me. 62, 19 Am. & Eng. R. R. Cas. 356.

as where a traveller was run over at a double-track level crossing at night by a train, which was running down grade with steam shut off, without a headlight, and not sounding signals, while another train was approaching the crossing on the other track, with headlight lit and sounding signals.¹

183. As between these conflicting presumptions, the balance of sound reason seems to preponderate in favour of the presumption that the person injured was negligent if he does not prove that he was careful, for, if the experience of mankind proves anything, it does abundantly prove that men, women, and children are, especially in this country, habitually reckless in approaching a railway line. Railway lines are here so rarely fenced, so little guarded, so easily approached, and so universally used as footwalks at all places save in the neighborhood of large cities, and grade crossings are unfortunately so much the rule and not the exception, that familiarity breeds contempt, and people approach and cross the line without realizing the danger which they incur. Every man who drives or walks about the country, in his own experience much more frequently observes instances of carelessness than of carefulness in the approach of people to railway lines. Mr. Beach puts this view forcibly in his work on "Contributory Negligence."

¹ *Smedis v. B. & R. B. R. R.*, 88 N. Y. 13, 8 Am. & Eng. R. R. Cas. 445.

CHAPTER IV.

THE LIABILITY OF THE RAILWAY TO THE PERSONS INCLUDED
IN THE SECOND CATEGORY, THAT IS, LICENSEES.

- I. The liability for injuries resulting from negligence in the construction or in the failure to repair the railway's premises.
- II. The liability for the negligent operation of the line.
- III. The effect of notice not to trespass.

184. The second category includes persons who come upon the railway's line or premises as mere licensees, that is, persons who, being neither passengers, servants, nor trespassers, and not standing in any contractual relation to the railway, are permitted by the railway to come upon its premises for their own interest, convenience, or gratification.

I. THE LIABILITY FOR INJURIES RESULTING FROM NEGLIGENCE IN THE CONSTRUCTION OF, OR IN THE FAILURE TO REPAIR, THE RAILWAY'S PREMISES.

The railway is not liable to licensees for injuries resulting from the condition of its premises or caused by its failure to maintain those premises in repair, but it is liable to licensees for injuries caused by negligence in the operation of its line.

185. As Martin, B., said in *Bolch v. Smith*,¹ "permission involves leave and license, but it gives no right." A railway, like other owners of real estate, is, therefore, not liable to mere licensees if its premises be out of repair,

¹ 7 H. & N. 736.

provided there be no such concealed danger as can be considered a trap for the unwary.¹

186. Under this general rule railways have been held not to be liable to visitors for the sufficiency and safety of their station buildings;² thus in *Lary v. C., C. & I. R. R.*,³ the railway was held not to be liable to one who, having taken refuge from a storm in a dilapidated building which had formerly been used as a freight house, but having been for some time unused had not been maintained in a condition of repair, was injured by the falling of its roof; so, in *Gillis v. P. R. R.*,⁴ the plaintiff sued to recover for injuries caused by the breaking down of the defendant's platform at a station under the pressure of a crowd of sightseers, the plaintiff having gone to the station to see a train carrying the President of the United States pass the station. At the trial the court directed a verdict for the defendant, and judgment thereon was affirmed in error upon the ground that the plaintiff having gone to the defendant's station for no purpose of business, but for his personal gratification, could not maintain the action; so, in *B. & O. R. R. v. Schwindling*,⁵ the plaintiff, an infant of five years of age, loitering upon the platform of defendant's station, was struck by a passing train and injured, and it was held that he was not entitled to recover, for the defendant owed him no duty; so, in *O. & R. V. R. R. v.*

¹ *Gautret v. Egerton*, L. R. 2 C. P. 374; *Collis v. Selden*, L. R. 3. Id. 495; *Southcote v. Stanley*, 1 H. & N. 246; *Wilkinson v. Fairrie*, 1 H. & C. 633; *Ivay v. Hedges*, 9 Q. B. D. 80; *Sutton v. N. Y. C. R. R.*, 66 N. Y. 243; *Nicholson v. Erie Ry.*, 41 Id. 525; *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Maenner v. Carroll*, 46 Md. 212; *Vanderbeek v. Hendry*, 34 N. J. Law 472; *Severy v. Nickerson*, 120 Mass. 306; *Larmore v. C. P. I. Co.*, 101 N. Y. 391.

² *I. C. R. R. v. Godfrey*, 71 Ill. 500; *P., F. W. & C. R. R. v. Bingham*, 29 Ohio St. 364; *Lary v. C., C. & I. R. R.*, 78 Ind. 323, 3 Am. & Eng. R. R. Cas. 498.

³ 78 Ind. 323, 3 Am. & Eng. R. R. Cas. 498.

⁴ 59 Penna. St. 139.

⁵ 12 Weekly Notes of Cases (Penna.) 349.

Martin,¹ the railway was held not to be liable to a mere licensee, who, while driving over the railway's premises was injured by falling into an unguarded excavation; so, in *Nicholson v. E. Ry.*,² and in *Sutton v. N. Y. C. & H. R. R. R.*,³ the railway was held not to be liable to licensees for a failure to set the brakes on cars stored on a siding, or otherwise block them, to prevent their movement by force of the wind, or by gravity.

II. THE LIABILITY FOR THE NEGLIGENT OPERATION OF THE LINE.

187. While licensees must take the railway's premises as they find them, and, therefore, cannot hold the railway liable for a failure of duty in not maintaining its premises in a condition of sound repair, yet the railway is bound as to such licensees to exercise ordinary care in the conduct of its business on the premises upon which it permits the licensees to come, and it is liable to them for injuries done to them by its want of such care. This distinction between what may be called active and passive negligence is well illustrated by the judgments of the Queen's Bench in *Gallagher v. Humphrey*,⁴ where a warehouse owner was held liable to a licensee for injuries caused by the negligence of a servant in his lowering of a barrel from an upper story of the warehouse, Cockburn, C. J., puts the distinction thus: "I quite agree that a person, who merely gives permission to pass and repass along his close, is not bound to do more than to allow the enjoyment of such permissive right under the circumstances in which the way exists, that he is not bound, for instance, if the way passes along the side of a dangerous ditch, or along the edge of a precipice, to

¹ 14 Neb. 295, 19 Am. & Eng. R. R. Cas. 236.

² 66 N. Y. 243.

³ 41 N. Y. 525.

⁴ 6 L. T. N. S. 684.

fence off the ditch or precipice. The grantee must use the premises as the thing exists. It is a different thing, however, where negligence on the part of the person thus having granted the permission is superadded. It cannot be that, having granted permission to use the way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way." In the same case, Wightman, J., said: "it appears to me that such permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on, but it is distinguishable from the case of injuries wholly arising from the negligence of that person's servants."

188. Upon this principle a railway has been held liable to licensees for injuries caused by the movement of trains by a flying switch.¹ So also, a railway has been held to be liable in damages for its negligence in leaving unattended the boiler of a steam pile driver, which exploded and injured one who was passing over a footway which, without objection from the railway, had been, for many years, used by the public.² It may be therefore stated as a general rule, that where a railway permits persons to cross its lines or premises, it is bound, as to those persons, to exercise care in the operation of its line, and it cannot treat them as trespassers.³ It is, of course, for the jury to decide, whether

¹ *Kay v. P. R. R.*, 65 Penna. St. 269; *P. & R. R. R. v. Troutman*, 11 Weekly Notes of Cases (Penna.) 455.

² *Davis v. C. & N. W. Ry.*, 58 Wisc. 646, 15 Am. & Eng. R. R. Cas. 424.

³ *Davis v. C. & N. W. Ry.*, 58 Wisc. 646, 15 Am. & Eng. R. R. Cas. 424; *Townley v. C. M. & St. P. Ry.*, 53 Wisc. 626, 4 Am. & Eng. R. R. Cas. 562; *Murphy v. B. & A. R. R.*, 133 Mass. 121; *Barrett v. M. Ry.*, 1 F. & F. 361; *Barry v. N. Y. C. & H. R. R. R.*, 92 N. Y. 289, 13 Am. & Eng. R. R. Cas. 615; *Goodfellow v. B., H. & E. R. R.*, 106 Mass. 461.

the user was adverse under a claim of right, or merely permissive as a licensee.¹

189. If the railway has, by the act of its servant, given the person injured reason to believe that he might, for a proper purpose, go on the line with safety, his presence on the line and his lack of vigilance is not contributory negligence. Thus, a person was held to be entitled to recover, who, while travelling in charge of cattle, was struck by a passing train on the main track when he had gotten out of a cattle train on a siding to recover a cow which had escaped from the train, the conductor having assured him that the cattle train had the right of way, and that he might safely go upon the line;² but the fact that the person injured is a servant of a contractor engaged by a municipal corporation to construct a bridge over the line, will not entitle him to go upon the line, nor give him any status other than that of a trespasser, if the circumstances show that the bridge could have been built without requiring the servants of the contractor to go upon the line.³

III. THE EFFECT OF NOTICE NOT TO TRESPASS.

190. Where notices have been put up by a railway, forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the railway's servants have not interfered to enforce their observance, the railway cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices as a defence to the claim of the person injured for damages.⁴

¹ F. R. R. v. Page, 131 Mass. 391, 7 Am. & Eng. R. R. Cas. 86.

² Fowler v. B. & O. R. R., 18 W. Va. 579, 8 Am. & Eng. R. R. Cas. 480.

³ Sweeney v. B. & A. R. R., 128 Mass. 5, 1 Am. & Eng. R. R. Cas. 138.

⁴ D. W. & W. Ry. v. Slattery, 3 App. Cas. 1155; O'Conner v. B. & L. R. R., 135 Mass. 352, 15 Am. & Eng. R. R. Cas. 362.

191. It must be remembered, in this connection, that where a person comes upon the premises of the railway, not as a trespasser, nor as a mere licensee, but for the purpose of transacting some business of common interest to both parties, or where that person comes upon the railway premises in the course of the performance of a contract based upon a valuable consideration, there is an implied warranty to him that the premises are reasonably safe, and that neither he, nor his property, shall be injured by negligence upon the part of the railway.

CHAPTER V.

THE LIABILITY OF THE RAILWAY TO PERSONS INCLUDED IN
THE THIRD CATEGORY, THAT IS, TRESPASSERS.

- I. Trespassers on railway premises.
- II. The turn-table cases.
- III. Trespassers upon the cars.
- IV. Trespassers on the line.

192. The third category includes trespassers upon the railway's premises, line, or cars.

I. TRESPASSERS ON THE RAILWAY'S PREMISES.

The railway is liable to trespassers upon its premises only for wilful injury—that is, for its maintenance of a means of injury so essentially dangerous that its existence is regarded as evidence of an intention to do a wilful injury; or, where the injury is done by the negligence of a servant, for the failure of the servant to exercise ordinary care, when, by its exercise, before the doing of the injury, and after he has discovered the injured person to be in peril, he could have avoided the doing of the injury; or where the injury is done by the act of a servant in the exercise of express authority delegated to him by the railway to do the particular act.

193. Owners and tenants of real estate are liable to trespassers for injuries caused by their unauthorized maintenance of means of injury so essentially dangerous that their existence upon the premises can be regarded as not merely negligence upon the part of the owner or tenant, but as evidence of an intention to do wilful injury. The best illustrations of this doctrine are

to be found in the cases of spring guns and dog spikes;¹ yet, even in such cases, a plaintiff who has gone upon the defendant's premises, with notice of the existence of the means of injury, will not be permitted to recover.²

194. But a railway, as an owner or tenant of real estate, is not to be held liable for injuries to a plaintiff who has strayed from the highway, and been injured by a cause of injury within the railway's premises, and not adjoining the highway, and whose existence is not evidence of an intention to do wilful injury.³ Thus in *Hardcastle v. S. Y. Ry.*,⁴ the plaintiff's decedent having strayed from the highway at night, and fallen into an unfenced canal-feeder within the defendant's premises, and been drowned, it was held that the railway was not liable. So, in *Gillespie v. McGowan*,⁵ the defendant was held not to be liable for the death of a boy of about eight years of age, who was drowned in an open well upon a vacant lot owned by the defendant. So, in *Gramlich v. Wurst*,⁶ the rule is laid down, that "where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon which is at such a distance from the public highway, that a person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained."

¹ *Bird v. Holbrook*, 4 Bing. 628, 15 E. C. L.; *Deane v. Clayton*, 7 Taunt. 489, 2 E. C. L.; *Sarch v. Blackburn*, 4 C. & P. 297, 19 E. C. L.; *Townsend v. Walther*, 9 East 277.

² *Hlott v. Wilkes*, 3 B. & Ald. 304, 5 E. C. L.; *Jordin v. Crump*, 8 M. & W. 782.

³ *Hardcastle v. S. Y. Ry.*, 4 H. & N. 67; *Binks v. S. Y. Ry.*, 3 B. & S. 244, 113 E. C. L.; *Stone v. Jackson*, 12 C. B. 199, 81 E. C. L.; *Blyth v. Topham*, Cro. Jac. 158; *Hounsell v. Smyth*, 7 C. B. N. S. 731, 97 E. C. L.; *Knight v. Abert*, 6 Penna. St. 472; *Gramlich v. Wurst*, 86 Id. 74; *Gillespie v. McGowan*, 100 Id. 144; *O. & R. V. R. R. v. Martin*, 14 Neb. 295, 19 Am. & Eng. R. R. Cas. 236.

⁴ 4 H. & N. 67.

⁵ 100 Penna. St. 144.

⁶ 86 Penna. St. 74.

II. THE TURN-TABLE CASES.

195. There is a class of cases—the “turn-table cases”—in most of which a result has been reached which is not reconcilable with the authorities just referred to. Thus, in *S. C. & P. Ry. v. Stout*,¹ the plaintiff, a boy of six years of age, having been injured while playing with other boys upon a turn-table within the railway's premises, but unfenced and unlocked, the injury having been directly caused by the other boys in so turning the table while the plaintiff was on it that his foot was crushed, Dillon, J., in the court below, directed the jury, “that to maintain the action it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine—one which, if unguarded or unlocked, would be likely to cause injury to children ; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence ; that they were, further, to consider whether, situated as it was in the defendant's property in a small town somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded ; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would

Gillespie v. McGowan, and *Gramlich v. Wurst*, do not seem to be reconcilable with the earlier case of *Hydraulic Works v. Orr*, 83 Penna. St. 332, but in the later Pennsylvania case of *Schilling v. Abernethy*, 17 Weekly Notes of Cases 364, where the owner of an alley, to which there was access from a house which was let to a tenant, was held liable to the tenant's son, a boy of twelve years of age, for injuries received by the falling upon him of the wall of a privy while he was walking in the alley, the defendant having negligently omitted to maintain the wall in a condition of good repair, Gordon, J., cites *Hydraulic Works v. Orr*, and treats it as of unshaken authority.

¹ 2 Dillon 294, 17 Wall. 657.

be likely to be injured if they did resort to it, then there was no negligence." Judgment upon a verdict for the plaintiff was affirmed in error, Hunt, J., saying, "that the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability of injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table on other occasions; and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was, in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turn-table when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch, which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved

to have been usual with railroad companies to have, upon their turn-tables, a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong, and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.”¹

196. On the other hand, in *St. L., V. & T. H. R. R. v. Bell*,² where the facts differed from those in *S. C. & P. Ry. v. Stout* only in that the turn-table, though unlocked, was secured by a latch, it was held that the railway was not liable; and in *Kolsti v. M. & St. L. Ry.*,³ the turn-table having been latched but not locked, the defendant having been permitted, against the plaintiff’s objection, to prove that the fastenings of its turn-table were similar in character to those in general use on turn-tables, the judge having directed the jury that “the defendant was

¹ This case is supported by *Evanisch v. G. C. & S. F. Ry.*, 57 Tex. 123, 6 Am. & Eng. R. R. Cas. 182; *Nagel v. M. P. Ry.*, 75 Mo. 653, 10 Am. & Eng. R. R. Cas. 702; *A. & N. R. R. v. Bailey*, 11 Neb. 332, 10 Am. & Eng. R. R. Cas. 742; *K. C. Ry. v. Fitzsimmons*, 22 Kans. 686, 18 Id. 34; *Keffe v. M. & St. P. Ry.*, 21 Minn. 207; *Koons v. St. L. & I. M. R. R.*, 65 Mo. 592.

² 81 Ill. 76.

³ 32 Minn. 133, 19 Am. & Eng. R. R. Cas. 140.

not required to so fasten or secure the turn-table that boys like the injured boy could not displace such fastenings and put the turn-table in motion," and the jury having found a verdict for the railway, an order refusing a new trial was affirmed in error. The doctrine of *S. C. & P. Ry. v. Stout*, and the cases of its class is, that railways are to be held to be negligent if they do not so construct the appliances which they use in the conduct of their business, or so guard them, that children cannot possibly injure themselves in meddling with those appliances when they come upon the railway premises or line, without any invitation, nor as mere licensees, but as trespassers. This doctrine is far-reaching, and if it is to be generally accepted, it must be applied in many other cases besides those of turn-tables. It must follow from this doctrine that railways will be liable, if children injure themselves by stealing into a round-house and putting in motion a locomotive engine, or by loosening the brakes, taking away the blocks, and moving cars stored on a siding in a railway yard, or by drowning themselves in a station water tank, or by falling into an ash pit, or by doing any one of a hundred other things which they have no right to do, and which it is not possible to prevent them from doing, unless railways fence and guard by police their stations, premises, yards, and lines. The miscarriage of justice in these cases has probably resulted from a misapprehension of that line of cases, of which *Daniells v. Potter*,¹ *Hughes v. Macfie*, *Abbott v. Macfie*,² *Lynch v. Nurdin*,³ and *Clark v. Chambers*⁴ are the most conspicuous, and which decide that one who leaves, in a public place where persons have a right to come, a dangerous machine, is liable for injuries caused thereby to persons

¹ 4 C. & P. 262, 19 E. C. L.

³ 1 Q. B. 29, 41 E. C. L.

² 2 H. & C. 744.

⁴ 3 Q. B. D. 327.

who are, in fact, without fault, or who, being infants, are, in law, incapable of being contributorily negligent. The distinction between that line of cases and the turn-table cases is in the public or private character of the place in which the instrument of danger is exposed. The misapprehension as to the legal effect of *Lynch v. Nurdin* and the cases of its class is evidenced by the statement of Hunt, J., in his judgment in *S. C. & P. Ry. v. Stout*, that the injured child in *Lynch v. Nurdin* was a trespasser, whereas the fact was that he was injured while climbing upon a cart which, with a horse attached to it, the defendant had left unattended in a public street, where the injured boy had a right to be, and where the defendant had no right to leave his horse and cart unattended. In contrast with the "turn-table" cases, the case of *C. & A. R. R. v. McLaughlin*,¹ may be profitably considered, for in that case it was held that it was not the duty of the railway to so guard its cars when standing on its line as to prevent children from injuring themselves by climbing over them.

III. TRESPASSERS UPON CARS.

197. As a general rule railways owe no duty to persons who come upon their cars, engines, or other means of transportation, as trespassers, and are, therefore, not liable to them for anything less than wilful injury,² thus

¹ 47 Ill. 265.

² *T. W. & W. Ry. v. Brooks*, 81 Ill. 245, 292; *C. & B. R. R. v. Michie*, 83 Id. 427; *Brown v. M. R. R.*, 64 Mo. 536; *T. W. & W. Ry. v. Beggs*, 85 Ill. 80; *Duff v. A. V. R. R.*, 91 Penna. St. 458; *Gardner v. N. H. & N. R. R.*, 51 Conn. 143; *Waterbury v. N. Y. C. & H. R. R. R.*, 17 Fed Rep. 671; *Eaton v. D., L. & W. R. R.*, 17 Fed. Rep. 671; *S. W. R. R. v. Singleton*, 66 Ga. 252; *Hoar v. M. C. Ry.*, 70 Me. 65; *Cauley v. P. C. & St. L. Ry.*, 95 Penna. St. 395, 98 Id. 498; *Flower v. P. R. R.*, 69 Id. 210; *H. M. & F. P. Ry. v. Connell*, 88 Id. 520; *Duff v. A. V. R. R.*, 91 Id. 458; *C. & N. W. Ry. v. Smith*, 46 Mich. 504, 4 Am. & Eng. R. R. Cas. 535.

in *Duff v. A. V. R. R.*,¹ a mother sued to recover damages for the death of her son, fifteen years of age, a newsboy, travelling by the connivance of the conductor for the purpose of selling papers, and killed in a collision; judgment on a verdict for the defendant was affirmed in error, because the plaintiff was a trespasser and the defendant owed him no duty; so in *C. & N. W. Ry. v. Smith*,² the railway was held not to be liable to a boy who was injured in jumping from the step of an engine upon which he trespassed, and from which he was ordered off by the fireman; so in *Cauley v. P., C. & St. L. Ry.*,³ a boy, seven years of age, while playing with some older boys upon a flat car, which was being slowly shifted from one switch to another on the defendant's line at the outskirts of a city, was ordered by the defendant's servants to jump off, and in so doing was injured. The boy and his parents brought separate actions, and the cases were tried together, and the judge at the trial directed a verdict for the defendant, judgment upon which was affirmed in error, upon the grounds that the father was contributorily negligent in permitting his child to trespass upon the defendant's line, and that the child being a trespasser the defendant owed him no duty.

198. Nevertheless, although the person injured be a trespasser, the railway will be liable to him if its servants, in the exercise of authority delegated to them, expel him with unnecessary violence.⁴ The distinction is this: if the trespasser's injuries are the result simply of the

¹ 91 Penna. St. 458.

² 46 Mich. 504, 4 Am. & Eng. R. R. Cas. 535.

³ 95 Penna. St. 395, 98 Id. 498.

⁴ *L. N. A. & C. R. R. v. Dunkin*, 92 Ind. 601, 15 Am. & Eng. R. R. Cas. 422; *Hoffman v. N. Y. C. & H. R. R. R.*, 87 N. Y. 25, 4 Am. & Eng. R. R. Cas. 537; *Schultz v. T. A. R. R.*, 89 N. Y. 242, 9 Am. & Eng. R. R. Cas. 412; *Carter v. L. N. A. & C. R. R.*, 98 Ind. 552, 22 Am. & Eng. R. R. Cas. 360.

railway's failure to perform that duty which it owes to every one who is rightfully upon its cars or other means of transportation, he cannot recover, for he was not rightfully there, and the railway has not failed to perform any duty which it owed to him; but if, on the contrary, his injuries are the result of the violence with which the railway's servants have expelled him from the railway's cars or premises, or if those injuries were caused by the circumstances under which he was expelled, as, for instance, from a train in motion, then the railway is liable to him therefor, provided always that the servant who expelled him was, in so doing, acting in the exercise of authority delegated to him by the railway.

IV. TRESPASSERS ON THE LINE.

199. A railway, where it has not granted to others a permissive use of its line, is entitled to the exclusive use and occupancy thereof. In England it is, and it ought to be everywhere, forbidden by statute to trespass upon a railway's line. It is the general rule that trespassers upon a railway line are entitled to recover for nothing less than wilful injury;¹ thus, in L. S. N. & C. R.

¹ Wright *v.* B. & M. R. R., 129 Mass. 440, 2 Am. & Eng. R. R. Cas. 121; L. S. N. & C. Co. *v.* Norton, 24 Penna. St. 465; Mulherrin *v.* D. L. & W. R. R., 81 Id. 366; P. & R. R. R. *v.* Spearen, 47 Id. 300; Moore *v.* P. R. R., 99 Id. 301; Cauley *v.* P. C. & St. L. Ry., 95 Id. 398; P., F. W. & C. R. R. *v.* Collins, 87 Id. 405; Clarke *v.* P. & R. R. R., 5 Weekly Notes of Cases (Penna.) 119; P. & R. R. R. *v.* Hummell, 44 Penna. St. 375; Lary *v.* C. C. C. & I. R. R., 78 Ind. 323, 3 Am. & Eng. R. R. Cas. 498; Harlan *v.* St. L., K. C. & N. R. R., 64 Mo. 480; I. C. R. R. *v.* Godfrey, 71 Ill. 501; C. R. R. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. R. Cas. 42; Baston *v.* G. R. R., 60 Ga. 340; S. W. R. R. *v.* Johnson, Id. 667; L. & N. R. R. *v.* Howard, Ky. , 19 Am. & Eng. R. R. Cas. 98; I. C. R. R. *v.* Hall, 72 Ill. 222; Pzolla *v.* M. C. R. R., 54 Mich. 273, 19 Am. & Eng. R. R. Cas. 334; Campau *v.* , 35 Mich. 468; Bresnahan *v.* M. C. Ry., 49 Mich. 410, 8 Am. & Eng. R. R. Cas. 147; Mason *v.* M. P. Ry., 27 Kans. 83, 6 Am. & Eng. R. R. Cas. 1; Temmenbrook *v.* S. P. C. R. R., 59 Cal. 269, 6 Am. & Eng. R. R. Cas. 8; Yarnall *v.* St. L., K. C. &

R. v. Norton,¹ the defendant company was the lessee of a branch line connecting with the main line of the P. & R. Co. at Port Clinton. The plaintiff, an employé of the P. & R. Co., was working with a portable steam engine and circular saw which he had placed upon the defendant's line, and he was injured by a train on the defendant's line running into him. Judgment upon a verdict for the plaintiff was reversed in error upon the ground that the defendant was entitled to the exclusive occupancy of its line, and that it owed no duty to the plaintiff; so in Carter v. C. & G. R. R.,² the railway was held not to be liable to a trespasser on its line, who had been injured by the explosion of a torpedo which a railway servant had placed on the rails and with which the trespasser had intermeddled; so in P. & R. R. R. v. Hummell,³ the plaintiff, seven years of age, brought suit to recover for injuries received while running beside a car upon the defendant's line, and falling under the wheels of the car. Judgment upon a verdict for the plaintiff was reversed in error for want of proof of defendant's negligence, Strong, J., saying, railway companies "have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the road of a

N. R. R., 75 Mo. 575, 10 Am. & Eng. R. R. Cas. 726; B. & O. R. R. v. Depew, 40 Ohio St. 121, 12 Am. & Eng. R. R. Cas. 64; H. & T. C. Ry. v. Richards, 59 Tex. 373, 12 Am. & Eng. R. R. Cas. 70; T. H. & I. R. R. v. Graham, 95 Ind. 236, 12 Am. & Eng. R. R. Cas. 77; L. & N. R. R. v. Watkins, Ky. , 12 Am. & Eng. R. R. Cas. 89; Bacon v. B. & P. R. R., 58 Md. 482, 15 Am. & Eng. R. R. Cas. 409; N. & C. R. R. v. Smith, 9 Lea (Tenn.) 470, 15 Am. & Eng. R. R. Cas. 469; Morris v. C. B. & Q. Ry., 45 Iowa 29; I. C. R. R. v. Hall, 72 Ill. 222; McAllister v. B. & N. W. Ry., 64 Iowa 395, 19 Am. & Eng. R. R. Cas. 103; Schittenhelm v. L. & N. R. R., Ky. , 19 Am. & Eng. R. R. Cas. 111; Scheffler v. M. & St. L. Ry., 32 Minn. 510, 19 Am. & Eng. R. R. Cas. 173.

¹ 24 Penna. St. 465.

² 19 Shand (S. C.) 20, 15 Am. & Eng. R. R. Cas. 414.

³ 44 Penna. St. 375.

clear track ; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians ;" so in *Mason v. M. P. Ry.*,¹ the railway was held not to be liable for the injuries of a woman who was run over while walking on a railway bridge. *A fortiori*, those are deemed to be trespassers, and as such disentitled to recover damages from the railway, whose injuries are the result of their culpable carelessness in going to sleep on a railway line, or in lying down on the line when intoxicated.² Nor will it relieve a trespasser on the line from liability for contributory negligence if he is injured on a highway crossing, to which he has come, not from the highway, but from the line;³ nor, if having been walking on the line, and having left it to escape a moving train, he does not place himself at a sufficient distance from the train, and is struck by a projecting plank.⁴

200. Regulations requiring the sounding of signals before approaching crossings or curves on the line are intended for the protection of travellers, and an engine-driver's disobedience of such a rule is not evidence of negligence when a trespasser on the line is injured.⁵

201. Engine-drivers are entitled to assume that trespassers upon the line, who are apparently of average

¹ 27 Kans. 83, 6 Am. & Eng. R. R. Cas. 1.

² *Richardson v. W. & M. R. R.*, 8 Rich. L. 120; *Felder v. L. C. & C. R. R.*, 2 Macmullan 403; *Herring v. W. & R. R. R.*, 10 Ired. 402; *Manly v. W. & W. R. R.*, 74 N. C. 655; *I. C. R. R. v. Hutchinson*, 47 Ill. 408; *Meeks v. S. P. R. R.*, 52 Cal. 604; *L. & N. R. R. v. Greene*, Ky. , 19 Am. & Eng. R. R. Cas. 95; *Fleytas v. P. R. R.*, 18 La. An. (O. S.) 339.

³ *Grethen v. C. M. & St. P. Ry.* (U. S. C. C. District of Minnesota), 19 Am. & Eng. R. R. Cas. 342.

⁴ *C. R. R. v. Brinson*, 70 Ga. 207, 19 Am. & Eng. R. R. Cas. 42.

⁵ *L. & N. R. R. v. Howard*, Ky. , 19 Am. & Eng. R. R. Cas. 98; *Tennenbrook v. S. P. C. R. R.*, 59 Cal. 259, 6 Am. & Eng. R. R. Cas. 8; Cf. *Ditberner v. C. M. & St. P. Ry.*, 47 Wisc. 138.

bodily and mental capacity, will get out of the way of the train;¹ but, where the railway servants in charge of the train see on the line a trespasser, whom they know to be incapacitated by deafness from hearing the train or its signals, it is their duty to stop the train; and the railway will be liable if they do not make every effort to do so;² so also, where they see a trespasser who is prevented from escaping by his foot being caught between the guard and main rail at a switch;³ so also, where they see a team stalled upon the line.⁴

202. The railway, under some circumstances, may owe to an infant a higher measure of duty than that which it owes to an adult; thus, if an engine-driver were to see a child upon the line it would be his duty to give warning by signal and make every effort to stop the train, for it is a reasonable supposition that the child might not sufficiently realize its danger, or, if it did, might not accurately appreciate the necessity of moving promptly off the line;⁵ thus, in *P. & R. R. R. v. Spearen*,⁶ the plaintiff, a girl of five years of age, was injured in attempting to run across the defendant's line, not at a public crossing, and between a coal train and an engine following closely after the train. Judgment upon a verdict for the plaintiff was reversed in error

¹ *P. & R. R. R. v. Spearen*, 47 Penna. St. 300; *Sims v. M. & W. R. R.*, 28 Ga. 93; *Schittenhelm v. L. & N. R. R.*, Ky., 19 Am. & Eng. R. Cas. 111; *Moore v. P. W. & B. R. R.*, 16 Weekly Notes of Cases (Penna.) 53; *Herring v. W. & R. R. R.*, 10 Iredell 402; *Bell v. H. & St. J. R. R.*, 72 Mo. 50, 4 Am. & Eng. R. R. Cas. 580; *L. & N. R. R. v. Cooper*, Ky., 6 Am. & Eng. R. R. Cas. 5; *T. H. & I. R. R. v. Graham*, 95 Ind. 286, 12 Am. & Eng. R. R. Cas. 77.

² *I. & G. N. Ry. v. Smith*, 62 Tex. 252, 19 Am. & Eng. R. R. Cas. 21.

³ *Burnett v. B. & M. R. R.*, 16 Neb. 332, 19 Am. & Eng. R. R. Cas. 25.

⁴ *C. & A. R. R. v. Hogarth*, 38 Ill. 370.

⁵ *P. & R. R. R. v. Spearen*, 47 Penna. St. 300; *Smith v. O'Connor*, 48 Id. 218; *Schwier v. N. Y. C. & H. R. R. R.*, 90 N. Y. 558, 14 Am. & Eng. R. R. Cas. 656; cf. *Bannon v. B. & O. R. R.*, 24 Md. 108.

⁶ 47 Penna. St. 300.

for want of proof of defendant's negligence, Agnew, J., saying: "The degree of care required of the servants of the company in such a case is dependent, in some measure, upon the capacity of the injured party. If an adult should place himself upon the railroad where he has no right to be, but where the company is entitled to a clear track, and the benefit of the presumption that it will not be obstructed, and should be run down, the company will be liable for wilful injury, or its counterpart, gross negligence. But if a child of tender years should do so, and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus. If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger; or, if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of capacity in the trespasser to avoid the danger to a want of it, would create a corresponding change in the duty in the engineer. In the former case, the adult, concurring in the negligence causing the disaster, is without remedy; in the latter, the child not concurring from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure

of ordinary care to save it, the child would be without remedy, for the company's use of the track is lawful, and the presence of the child upon the track is unlawful."

203. Yet there is no inexorable rule of law which requires a train to be stopped whenever a child is seen upon the line;¹ or a street car;² thus, in *P. R. R. v. Morgan*,³ the plaintiff, a girl of five years of age, was playing on the defendant's line in the outskirts of a town, when a repair train, with a caboose car in the front, backed slowly down, two of the train hands being on the lookout at the front of the caboose car. The plaintiff, seeing the train, started to run off the track, but caught her foot between the rail and a space left for the flange of the wheel. The train hands, seeing her caught, promptly applied the brakes and signalled to the engine-driver, who reversed the engine, but although every possible exertion was used it was impossible to stop the train until the front car had run past her. The front wheel of the caboose, sliding under the pressure of the brake, pushed the plaintiff's foot out of her shoe and lacerated her foot, producing a permanent injury. Judgment on a verdict for the plaintiff was reversed in error, because the judge, at the trial, instructed the jury that the train hands, having seen the girl upon the track, were bound to stop, because they had no right to assume that a child knows its danger, or had the capacity to apprehend it, whereas, it should have been left to the jury to find, whether, under all the circumstances, the defendant was negligent, there being no inexorable rule that a train must stop, under all cir-

¹ *Singleton v. E. C. Ry.*, 7 C. B. N. S. 237, 97 E. C. L.; *P. R. R. v. Morgan*,¹ 82 Penna. St. 135; *Meyer v. M. P. R. R.*, 2 Neb. 319.

² *P. C. P. Ry. v. Henrice*, 92 Penna. St. 431, 4 Am. & Eng. R. R. Cas. 544; *Walters v. C., R. I. & P. Ry.*, 41 Iowa 71.

* 82 Penna. St. 135.

cumstances, when a child is seen upon the track. Nor can an infant, who is a trespasser on the line, recover for anything less than wilful injury, or a carelessness upon the part of the railway servants, so great as not to be distinguishable from wilful injury, where the circumstances are not such as to bring the fact of the child's infancy and consequent want of capacity to the notice of the servants of the railway.¹

204. In some jurisdictions it is held that a trespasser upon the line can recover, if the injury might have been avoided by the use of ordinary care and caution upon the part of the railway.² So it has been held that where trespassers on the line were run over while asleep, or insensible from intoxication, the railway was liable, if its servants in charge of the train could, by the exercise of ordinary care, have discovered the presence of the injured persons and avoided the injury and did not do so.³ The practical effect of those authorities seems to be

¹ *Singleton v. E. C. Ry.*, 7 C. B. N. S. 287, 97 E. C. L.; *P. & R. R. R. v. Hummel*, 44 Penna. St. 375; *Flower v. P. R. R.*, 69 Id. 210; *Clark v. P. R. R.*, 5 Weekly Notes of Cases (Penna.) 119; *H. M. & F. P. Ry. v. Connell*, 88 Penna. St. 520; *Duff v. A. V. R. R.*, 91 Id. 458; *B. & O. R. R. v. Schwindling*, 101 Id. 258; *Moore v. P. R. R.*, 11 Weekly Notes of Cases (Penna.) 310; *Hydraulic Works Co. v. Orr*, 83 Penna. St. 332, as explained in *Gramlich v. Wurst*, 86 Id. 74, and substantially overruled in *Gillespie v. McGowan*, 100 Id. 144; *Cauley v. P., S., C. & St. L. Ry.*, 95 Id. 398; *Woodbridge v. D., L. & W. R. R.*, 105 Id. 460; *L. & N. R. R. v. Greene*, Ky., 19 Am. & Eng. R. R. Cas. 95; *Morrisey v. E. R. R.*, 126 Mass. 377; *cf. P. R. R. v. Lewis*, 79 Penna. St. 33; *Penna. Co. v. James*, 81 $\frac{1}{2}$ Id. 194; *Frick v. St. L., K. C. & N. Ry.*, 75 Mo. 595, 8 Am. & Eng. R. R. Cas. 280; *L. & N. A. & C. R. R. v. Head*, 80 Ind. 117, 4 Am. & Eng. R. R. Cas. 619; *Isabel v. H. & St. J. R. R.*, 65 Mo. 475. .

² *E. T. V. & G. R. R. v. Fain*, 12 J. B. Lea (Tenn.), 35, 19 Am. & Eng. R. R. Cas. 102; *Morris v. C. B. & Q. Ry.*, 45 Iowa 29; *McAllister v. B. & N. W. Ry.*, Iowa, 19 Am. & Eng. R. R. Cas. 108; *I. C. R. R. v. Modglin*, 85 Ill. 481; *Meeks v. S. P. R. R.*, 56 Cal. 513, 8 Am. & Eng. R. R. Cas. 314; *Brown v. H. & St. J. R. R.*, 50 Mo. 461.

³ *H. & T. C. Ry. v. Sympkins*, 54 Tex. 615, 6 Am. & Eng. R. R. Cas. 11; *Meeks v. S. P. R. R.*, 56 Cal. 513, 8 Am. & Eng. R. R. Cas. 314; *E. T. V. & G. R. R. v. Humphreys*, 12 Lea (Tenn.) 200, 15 Am. & Eng. R. R. Cas. 472; *Keyser v. C. & G. T. Ry.*, Mich., 19 Am. & Eng. R. R. Cas. 91; *E. T. & G. R. R. v. St. John*, 5 Snead (Tenn.) 524.

that the railway is to be held liable if its servants do not, in running its trains, exercise vigilance in looking for trespassers on the line, and care in avoiding injury to them, but as the railway is entitled to the exclusive possession and use of its line, it is not reasonable to require its servants to assume that trespassers will come on the line, or that being on the line they will not heed signals that warn them of their danger. Upon principle the more reasonable doctrine would seem to be that stated in the preceding paragraph, the result of which is that engine-drivers are not bound to assume that trespassers will be on the line, or to watch for them, and that when they do see a trespasser on the line, apparently of adult years and of average capacity, they are bound to warn him by signal of his danger, and that having done so they may assume that he will get off the line and that they are only bound to stop the train when the circumstances of the locality are such (for instance, on a bridge or in a narrow cutting) that the trespasser does not have an opportunity to escape, or when the trespasser does not apparently hear or heed or comprehend the warning of his danger.

205. The mere fact that people have frequently trespassed upon a railway line, and that the railway has not resorted to any means to protect its exclusive possession of its line, will not imply the railway's consent to such user, nor vest in the public any right thereto.¹ On the other hand, in *Hoppe v. C. M. & St. P. Ry.*,² in the case of a child who was killed while trespassing on the line, evidence was admitted to show that the railway line was generally used as a footway by the resi-

¹ *C. R. R. v. Brinson*, 70 Ga. 207, 19 Am. & Eng. R. R. Cas. 42; *I. C. R. R. v. Godfrey*, 71 Ill. 506; *B. & O. R. R. v. The State of Maryland*, to the use of *Allison*, 62 Md. 479, 19 Am. & Eng. R. R. Cas. 83.

² 61 Wisc. 357, 19 Am. & Eng. R. R. Cas. 74.

dents of the neighborhood, and a recovery against the railway was sustained. The same view was taken in *P. R. R. v. Lewis*.¹ But, of course, a right of way across a line may be gained by an adverse user just as any other right of way may be acquired, and people whom the railway has permitted to cross its line cannot be treated as trespassers, for they are licensees.

206. In *Hayes v. M. C. Ry.*,² the railway was, by reason of its failure to perform a statutory duty to fence its line on the border of a public park, held liable for the injuries of a boy of less than nine years of age, who having strayed from the park was, while trespassing on the line, run over by a train.³ On the other hand, in *Fitzgerald v. St. P., M. & M. Ry.*,⁴ it was held, Gilfillan, C. J., dissenting, that a failure on the part of the railway to fence its line in obedience to a statute, whose declared purpose was the prevention of injury to cattle, could not be imputed to the railway as negligence in the case of a child who had strayed upon the line and been injured.

¹ 79 Penna. St. 33.

² 111 U. S. 228, 15 Am. & Eng. R. R. Cas. 394.

³ See also, *Keyser v. C. & G. T. Ry.*, Mich. , 19 Am. & Eng. R. R. Cas. 91; *Hynes v. S. F. & N. P. R. R.*, Cal. , 20 Am. & Eng. R. R. Cas. 486; *Schmidt v. M. & St. P. Ry.*, 23 Wisc. 186.

⁴ 29 Minn. 336, 8 Am. & Eng. R. R. Cas. 310.

CHAPTER VI.

THE LIABILITY OF THE RAILWAY TO THE PERSONS INCLUDED
IN THE FOURTH CATEGORY,—PASSENGERS, ETC.

- I. The general principle determining the liability.
- II. Passengers.
- III. Persons to whom the railway owes the same measure of duty that it owes to its passengers.
- IV. The Pennsylvania Act of 4 April, 1863.
- V. The general duty of the railway to its passengers and to those to whom it owes a like duty.
- VI. The duty as to the adoption of improved appliances and methods of operation.
- VII. Railway regulations as affecting passengers.
- VIII. Station approaches, platforms, and buildings.
- IX. Boarding and descending from cars.
- X. The duty of the railway in the operation of its line.
- XI. Contributory negligence of passengers.

I. THE GENERAL PRINCIPLE DETERMINING THE LIABILITY OF THE RAILWAY.

207. The fourth category includes persons who, in the course of the performance of a contract based upon a valuable consideration, come upon the line, premises, or cars of the railway, including herein passengers of the railway; attendants of passengers; passengers of another railway received for transportation in the railway's cars; passengers of another railway whose cars are run over the line of the railway; passengers of another railway with whom a station is jointly occupied; servants of another railway while upon the line or premises of the railway in the performance of their duty to that other railway; consignors, consignees, and their agents, personally assisting in the reception, carriage, or delivery of their freight; persons entering under special contract upon the railway's line

or premises; Post Office employés carried under a contract between the railway and the Post Office Department, or under a statutory duty imposed upon the railway; persons carried under contract between the railway and a third party; servants of express companies whose cars are run, or whose goods are carried, over the line; and persons who are carried on the line to sell refreshments, newspapers, etc., to the passengers. All the individuals included in the several classes of this category are entitled to demand of the railway a like measure of duty.

The railway is liable for negligence to persons who come upon its line, premises, or cars, in the course of the performance of a contract based upon a valuable consideration.

208. Where a person, in the course of the performance of a contract made by the railway upon a valuable consideration, comes upon the line, station, station approaches and surroundings, or other premises of a railway, there is an implied warranty upon the part of the railway to him that its line, station, station approaches and surroundings, or other premises, are safe, in so far as care on the part of the railway can make them safe, and that he shall not be injured by negligence upon the part of the railway in the conduct of its business.¹ The leading case is *Parnaby v. Lancaster*

¹ *Parnaby v. L. Canal Co.*, 11 Ad. & El. 223, 39 E. C. L.; *Mersey Docks Co. v. Gibbs*, 3 H. & N. 164, 11 H. L. C. 686, L. R. 1 H. L. 93; *Marfell v. S. W. Ry.*, 8 C. B. N. S. 525, 98 E. C. L.; *Winch v. Conservators of the Thames*, L. R. 9 C. P. 378; *Hartnall v. Ryde Commrs.*, 4 B. & S. 361, 116 E. C. L.; *Ohrby v. Ryde Commrs.*, 5 B. & S. 743, 117 E. C. L.; *Corby v. Hill*, 4 C. B. N. S. 556, 93 E. C. L.; *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L.; *Chapman v. Rothwell*, E. Bl. & E. 168, 96 E. C. L.; *Thompson v. N. E. Ry.*, 2 B. & S. 106, 110 E. C. L.; *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 Id. 311; *Smith v. L. & St. K. Docks Co.*, L. R. 3 Id. 326; *White v. France*, L. R. 2 C. P. D. 308; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Lax v. Corporation of Darlington*, 5 Ex. Div. 28; *Briggs v. Oliver*, 4 H. & C. 408; *Heaven v. Pender*, 11 Q. B. D. 502; *Godley v. Haggerty*, 20 Penna. St. 387; *Carson v. Godley*, 26 Id.

Canal Co.,¹ where it was held in the Court of Exchequer Chamber that a canal company, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, and were liable in damages to the plaintiff, whose boat in navigating the canal had been injured by collision with a sunken boat which the canal company had neglected to remove, and Tindal, C. J.,² thus stated the principle upon which was rested the liability of the defendant: "the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property." The ground of liability thus clearly stated was approved in the judgments delivered in the House of Lords in the later case of *The Mersey Docks, Trustees v. Gibbs*.³ So in *Francis v. Cockrell*,⁴ where the defendant, being one of the stewards of a race, had employed a competent contractor to erect a stand from which the race could be viewed, and the plaintiff, having paid a pecuniary consideration for admission, was injured by the fall of the stand resulting from negligence on the part of the contractor in building it, it was held that the defendant was liable in damages to the plaintiff, Kelly, C. B., saying: "that one who lets for hire, or engages for the supply of, any article or thing, whether it be a carriage to be ridden in, or a

111; *Walden v. Finch*, 70 Id. 460; *McKee v. Bidwell*, 74 Id. 218; N. O. M. & C. R. R. v. Hanning, 15 Wall. 649; *Bennett v. L. & N. R. R.*, 102 U. S. 577, 1 Am. & Eng. R. R. Cas. 71; *Carleton v. F. I. Co.*, 99 Mass. 216; L. & B. R. R. v. Chenewith, 52 Penna. St. 382; *Fries v. Cameron*, 4 Richardson 228.

¹ 11 Ad. & El. 223, 39 E. C. L.

² P. 242.

³ L. R. 1 H. L. 93.

⁴ L. R. 5 Q. B. 501.

bridge to be passed over, or a stand from which to view a steeple chase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant and does impliedly contract that the article is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen, or unknown, defect which could not be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry or examination." So in *Heaven v. Pender*,¹ where the defendant, a dock owner, supplied, under contract with a ship owner, a staging for use by the servants of a painter who had contracted with the ship owner to paint the ship, and the plaintiff, who was one of the painter's servants, was injured by reason of the fall of the staging resulting from negligence upon the part of the dock owner in failing to provide sound tackle, it was held in the Court of Appeal, reversing the Queen's Bench Division, that the defendant was liable. Brett, M. R.,² putting the liability in general terms says: "that whenever one person is, by circumstances, placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or the property of the other, a duty arises to use ordinary care and skill to avoid such danger." Cotton and Bowen, L. J.J., however, while holding the defendant liable did not concur in the generality of the principle as stated by the Master of the Rolls. So in *Elliott v. Hall*,³ a colliery owner and consignor of coals was held liable to the servant of his consignee for injuries received in unloading coals from

¹ 11 Q. B. D. 503

² P. 509

³ 15 Q. B. D. 315.

a truck, which had been hired by the consignor from a third party for use in the transportation and delivery of coals to the consignee, and which, when out of repair by the negligence of the consignor's servants, had been sent to the consignee. Grove, J., said: "if vendors of goods forward them to the purchasers, and for that purpose supply a truck, or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who, necessarily, will have to unload, or otherwise deal with the goods, to see that the truck, or other means of conveyance, is in good condition and repair, so as not to be dangerous to such persons. I do not say that the vendors would be responsible for latent defects, or matters that they could not reasonably foresee, but they are, in my opinion, bound to see that the machinery of the truck is apparently in good order."

209. The result of the authorities, therefore, is that wherever one party enters into relations with another party upon the basis of a contract made upon a valuable, though not necessarily a pecuniary, consideration, and those relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law then exacts of him who supplies that material agency the duty of exercising care in its selection, maintenance in repair, and operation; and this duty must be so performed as to protect not only the contracting party, but also those agents, servants, and assistants, whom the nature of the relation between the contracting parties justifies him in employing. Such is the general principle upon which rests the liability of railways to the persons included in the fourth category. It must, however, be borne in mind,

in this connection, that if there be an express contract between the railway and any one of the persons included in the fourth category, and if that contract be enforceable in law, its terms must, so far as they extend, determine the liability, but, if there be no such enforceable contract, the liability of the railway rests solely upon the duty imposed by law.

II. PASSENGERS.

The relation of passenger and carrier is dependent upon the existence of a contract of carriage.

210. A passenger may be defined to be a person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, and whom the railway, in the course of the performance of that contract, has received at its station, or in its car, or under its care. A substantially similar definition is given by Paxson, J., in *Price v. P. R. R.*¹

211. The terms of the definition show that the relation of carrier and passenger is dependent upon the existence of a contract of carriage made upon a valuable consideration between the passenger and the railway acting in the exercise of its charter powers, but to constitute one a paying passenger, the payment of fare in money is not essential,² for any valuable consideration moving from the person injured to the railway will render him a paying passenger, such as the fact that he was travelling as a drover in charge of his cattle, which the railway was transporting for hire;³ or that

¹ 96 Penna. St. 267.

² *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; *Hart v. S. R. R.*, 40 Miss. 391.

³ *N. Y. C. R. R. v. Lockwood*, 17 Wall. 357; *I. & St. L. R. R. v. Horst*, 93 U. S. 291; *C. P. & A. R. R. v. Curran*, 19 Ohio St. 1; *O. & M. Ry. v. Selby*,

he, as the owner of a patented coupler, was travelling on the defendant's line at its invitation in the course of negotiations for the adoption of his patent;¹ or that he was a detective carried over the line on a hand-car in the performance of a special duty, for which the railway had entered into a contract with him;² or that he was with the consent of the railway travelling on a freight train in charge of stock or goods carried by the railway for him.³

212. So where the railway has contracted to carry an individual whose fare is paid, or is agreed to be paid, by the person with whom the contract is made, the railway is liable to the individual, who is so received for carriage, to the same extent as if he had personally paid fare before coming upon the railway's premises or entering its cars; thus, in *Austin v. G. W. Ry.*,⁴ the defendant's charter requiring it to carry gratuitously upon certain trains children under three years of age, and to charge half fare for children between three and twelve years of age, and the plaintiff, a child of more than three years of age, having been without fraudulent intent taken by its mother, who had purchased a ticket only for herself, upon the defendant's train, and having been injured by the defendant's negligence, after verdict for the plaintiff, a rule for a new trial was refused, it being held that the plaintiff could recover upon the

¹ *G. T. Ry. v. Stevens*, 95 U. S. 655.
² *Pool v. C. M. & St. P. Ry.*, 53 Wisc. 657, 3 Am. & Eng. R. R. Cas. 332, 56 Wisc. 227, 8 Am. & Eng. R. R. Cas. 360.

³ *I. R. R. v. Beaver*, 41 Ind. 493; *Lawson v. C. St. P., M. & O. R. R.*, 64 Wisc. 447, 21 Am. & Eng. R. R. Cas. 249.
⁴ *L. R. 2 Q. B. 442.*

duty of the railway to carry safely every one whom it had received for carriage, and also upon the ground of a contract by the defendant with the mother to carry her and the plaintiff safely, and that the non-payment of fare by the mother for her child, while rendering the mother liable to the defendant for that fare, could not be held to bar the plaintiff's recovery. So in *G. N. R. R. v. Harrison*,¹ the issue being whether the plaintiff when injured was lawfully in the defendant's carriage, it was held by the Court of Exchequer Chamber that the plaintiff was entitled to the verdict on that issue, having proven that he, being a reporter of a newspaper, had travelled *bona fide* upon a ticket issued at a reduced rate to the proprietor of the paper for his reporters, and supplied by him to the plaintiff, though the ticket bore the name of another reporter of that paper and was marked "not transferable," it also being shown that the defendant's porter had examined the ticket and had placed the reporter in a carriage, and also that the defendant's servants had on other occasions permitted reporters of that paper to use indifferently the several tickets issued for that paper. Upon the same principle the railway, in *Marshall v. Y. N. & B. Ry.*,² was held liable to the valet of a nobleman for the loss of his personal luggage, although the master had taken and paid for the servant's ticket. So in *Skinner v. L. B. & S. C. Ry.*,³ the defendant had contracted with a benevolent society to run a train from London to Brighton and return for a gross sum to be paid by the society. The plaintiff, a passenger on the train, having purchased his ticket from the society, was injured in a collision caused by the defendant's negligence. At the trial the defendant objected that there

¹ 10 Ex. 376.

² 11 C. B. 655, 73 E. C. L.

³ 5 Ex. 787.

was no evidence that the plaintiff was a passenger to be carried by the defendant for hire, but, after verdict for the plaintiff, it was held that the defendant's duty to carry safely any person lawfully in its carriages would support the action.¹

213. So where a contract of carriage has been in fact made between the railway and the passenger, and the railway has agreed to transport the passenger gratuitously, it is liable to him to the same extent as if he had paid his fare before coming upon the railway's premises or entering its cars. The existence of the contract of carriage, as a fact, fixes the liability of the railway, and the law finds an adequate consideration for such a contract, in the doctrine that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."² The railway is, therefore, liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. Thus, in *P. & R. R. v. Derby*,³ the plaintiff, a president of another line, and a shareholder of the corporation defendant, having been injured while being carried over the defendant's line at the invitation of its president, judgment upon a verdict for the plaintiff was affirmed in error, Grier, J., saying, the duty of the defendant to carry carefully "does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous."⁴

¹ See also *O. & M. R. R. v. Muhling*, 30 Ill. 9; *N. & C. R. R. v. Messino*, 1 Sneed (Tenn.) 220; *Hurt v. S. R. R.*, 40 Miss. 391.

² *Coggs v. Bernard*, 1 Sm. L. C. 293.

³ 14 Howard 468.

⁴ See also *Steamboat New World v. King*, 16 How. 469; *P. R. R. v. Butler*, 57 Penna. St. 335; *B. P. & W. R. R. v. O'Hara*, 12 Weekly Notes of Cases (Penna.) 473; *Todd v. O. C. R. R.*, 3 Allen 18, 7 Id. 207; *Jacobus v. St. P. & C.*

214. It has been stated in section 211, that the existence of the relation of carrier and passenger is dependent upon the making of a contract of carriage. From this, it follows that railways are not liable to persons who have not been accepted as passengers, and the intention of the person to pay his fare and his good faith are immaterial, when there has been no contract, express or implied, on the part of the railway.¹ *A fortiori*, where the person injured is a trespasser on the cars, the railway owes him no duty, and is not bound to indemnify him for anything less than injuries wilfully inflicted.² Thus, in *Duff v. A. V. R. R.*,³ a mother sued to recover for the death of her son, a newsboy, whom the defendant's train hands permitted to travel for the purpose of selling newspapers, and judgment on a verdict for the defendant was affirmed in error, upon the ground that the plaintiff's son was a trespasser and not a passenger. So, where the person injured travels on a non-transferable free pass, which was issued to another person, and represents himself to be that person, he can recover for

Ry., 20 Minn. 125; *Rose v. D. M. V. R. R.*, 39 Iowa 246; F. & P. M. Ry. v. Weir, 37 Mich. 111; *Lemon v. Chanslor*, 68 Mo. 340; O. & M. Ry. v. Selby, 47 Ind. 471; *Waterbury v. N. Y. C. & H. R. R. R.*, 17 Fed. Rep. 671; *Abell v. W. M. R. R.*, 63 Md. 433, 21 Am. & Eng. R. R. Cas. 503; *Gillenwater v. M. & I. R. R.*, 5 Ind. 339; O. & M. Ry. v. Nickless, 71 Ind. 271; *Prince v. I. & G. N. R. R.* 64 Tex. 144, 21 Am. & Eng. R. R. Cas. 152.

¹ *Gardner v. N. H. & N. Co.*, 51 Conn. 143, 18 Am. & Eng. R. R. Cas. 170.

² *T. W. & W. Ry. v. Brooks*, 81 Ill. 245, 292; *C. & B. R. R. v. Michie*, 83 Id. 427; *Brown v. M. K. & T. R. R.*, 64 Mo. 536; *T. W. & W. Ry. v. Beggs*, 85 Ill. 80; *Duff v. A. V. R. R.*, 91 Penna. St. 458.

³ 91 Penna. St. 458.

In some of the cases, as, for instance, in *B. P. & W. R. R. v. O'Hara*, 12 Weekly Notes of Cases (Penna.) 473, it is held that a railway cannot, by contract with a passenger whom it carries gratuitously, exempt itself from liability for the results of its negligence; but the contrary doctrine is asserted in other cases, for instance, in *Kinney v. C. R. R. of N. J.*, 34 N. J. L. 513. The subject of the railway's right to limit its liability to passengers, whether carried for full fare, or gratuitously, is considered in the last chapter of this work.

nothing less than wilful injury.¹ Nor can one recover, who, with intent to defraud the railway, induces the railway servants to carry him without payment of fare.² The same principle was applied in the case of *B. & B. Ry. v. Keys*,³ where the plaintiff, knowing that while the defendant carried luggage free, it yet required merchandise to be paid for, took with him in defendant's carriage a case of merchandise as luggage, and did not declare nor pay for it, and it was held that he could not recover for its loss; because, by reason of his fraudulent concealment, there was no express or implied contract between the defendants and himself with respect to that merchandise.

215. Where the person injured has been permitted by the defendant's servants to ride upon the railway without paying fare, the railway is liable if the servant was expressly or impliedly authorized to bind the railway by such permission;⁴ but where the regulations of the railway deny to the servant the authority of accepting passengers, the railway is not liable.⁵ Conductors in charge of passenger trains have an implied authority to accept persons as passengers thereon,⁶ but as freight trains are run by railways for the transportation of freight, not passengers, the servants of the railway when

¹ *T. W. & W. Ry. v. Beggs*, 85 Ill. 80.

² *T. W. & W. Ry. v. Brooks*, 81 Ill. 245, *Id.* 292.

³ 9 Ill. L. C. 555.

⁴ *Sherman v. H. & St. J. R. R.*, 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589; *Wilton v. M. R. R.*, 107 Mass. 108; *Same v. Same*, 125 Mass. 130; *P. A. & M P. Ry. v. Caldwell*, 74 Penna. St. 421; *Gardin v. St. P. & D. Ry.*, 30 Minn. 217, 11 Am. & Eng. R. R. Cas. 644; *Seeor v. St. P. M. & M. Ry.*, 18 Fed. Rep. 221; *Lucas v. M. & St. P. Ry.*, 33 Wise. 41; *Creed v. P. R. R.*, 86 Penna. St. 139.

⁵ *T. W. & W. Ry. v. Brooks*, 81 Ill. 245; *C. & B. R. R. v. Michie*, 83 *Id.* 427; *Duff v. A. V. R. R.*, 91 Penna. St. 458; *Jenkins v. C. M. & St. P. Ry.*, 41 Wise. 112; *H. & T. C. Ry. v. Moore*, 49 Tex. 31; *Gardner v. N. H. & N. Co.*, 51 Conn. 143, 18 Am. & Eng. R. R. Cas. 170.

⁶ *P. R. R. v. Books*, 57 Penna. St. 345; *Creed v. P. R. R.*, 86 *Id.* 139.

in charge of such trains have no implied authority to invite strangers to become passengers thereon, and in the absence of proof of express authority vested in the conductor of a freight train the acceptance of his invitation to ride thereon does not make a stranger a passenger;¹ nor have railway servants an implied authority to accept persons as passengers on pay cars,² or on hand cars,³ but if it be proven that the railway servant was authorized to accept the person as a passenger on a hand car,⁴ or on a freight train,⁵ the railway will, by reason of such acceptance, be liable to him as a passenger.

216. Where an individual is carried by a railway in performance of the conditions of a contract of service he is to be regarded as a servant, not as a passenger, thus, in *Tunney v. The Midland Ry.*,⁶ the plaintiff was a laborer employed to load a pick-up train, and the defendant had contracted to carry him to and from his work by train. While returning after his day's work was done he was injured through the negligence of one of the guards, and it was held that he could not recover, for he was carried, not as a passenger, but under a contract of service, and the cause of the injury was the negligence of a fellow-servant; Willes, J., saying: "there is always a strong inclination to find some mode to give the plaintiff redress in cases of this sort, but one man's misfortune must not be compensated for at another

¹ *Eaton v. D., L. & W. R. R.*, 57 N. Y. 382; *Waterbury v. N. Y. C. & H. R. R.*, 17 Fed. Rep. 671; cf. *Dunn v. G. T. Ry.*, 58 Me. 187.

² *S. W. R. R. v. Singleton*, 66 Ga. 252.

³ *Hoar v. M. C. Ry.*, 70 Me. 65.

⁴ *Pool v. C., M. & St. P. Ry.*, 56 Wisc. 227, 8 Am. & Eng. R. R. Cas. 360; *Prince v. I. & G. N. R. R.*, 64 Tex. 144, 21 Am. & Eng. R. R. Cas. 152.

⁵ *Dunn v. G. T. Ry.*, 58 Me. 187; *Lucas v. M. & St. P. Ry.*, 33 Wisc. 41; *Secord v. St. P., M. & M. Ry.*, 18 Fed. Rep. 221; *Sherman v. H. & St. J. R. R.*, 72 Mo. 621, 4 Am. & Eng. R. R. Cas. 580; *O. & M. R. R. v. Mahling*, 30 Ill. 9; *T. & P. Ry. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. R. Cas. 384.

⁶ *L. R. 1 C. P.* 291.

man's expense." So also in *Ryan v. C. V. R. R.*,¹ the plaintiff, a laborer in the defendant's employment, was engaged in repairing the road, and was carried to and from his work on the cars, and while being so carried he was injured by the negligence of the engine-driver. It was held that he could not recover because he was not a passenger, but a servant whose transportation was an incident to his service, and that the defendant was not liable for the negligence of the engine-driver, who was the plaintiff's co-employé.² This rule has been held to bar recovery in the case of a discharged servant, who, on a journey to obtain other employment, was injured while riding in a baggage car without payment of fare;³ but was held not to bar recovery in the case of a servant of a contractor engaged in repairing the line and transported in the railway's cars.⁴ There are, however, some cases which are not reconcilable with those which have been quoted; thus, in *O'Donnell v. A. V. R. R.*,⁵ the plaintiff, a journeyman carpenter, employed by the defendant to repair its bridges, and carried to and from his work by the defendant's train, was engaged at lower wages in consideration of the company's carrying him free to and from his work, and while being so carried he was injured, the car in which he was riding being thrown from the track by a broken rail. It was held that the plaintiff was a passenger because he had no duty to perform upon the train, and because, by the re-

¹ 23 Penna. St. 384.

² See also *Gillshannon v. S. B. R. R.*, 10 Cush. 228; *Seaver v. B. & M. R. R.*, 14 Gray 466; *Russell v. H. R. R. R.*, 17 N. Y. 134; *Ross v. N. Y. C. & H. R. R. R.*, 74 Id. 617; *N. Y. C. & H. R. R. R. v. Vick*, 95 Id. 267, 17 Am. & Eng. R. R. Cas. 609; *K. P. Ry., v. Salmon*, 11 Kans. 83; *McQueen v. C. B. U. P. R. R.*, 30 Kans. 689, 15 Am. & Eng. R. R. Cas. 226.

³ *H. & St. J. R. R. v. Higgins*, 36 Mo. 418.

⁴ *Torpy v. G. T. Ry.*, 20 Up. Can. (Q. B.) 446.

⁵ 50 Penna. St. 490, 59 Id. 239.

duction in his wages, he, in effect, paid fare for his transportation.¹ The right doctrine would seem to be that whenever the person injured is carried in performance of a contract of service, the railway is not to be liable to him as a passenger, but only as a servant.

217. It would seem also to be clear that a passenger will not, by the performance of a casual service on a train, cease to be a passenger and become an employé of the railway. Thus, in *C. V. R. R. v. Myers*,² the conductor of a private freight car which was being hauled on the defendant's line, having, at the request of the defendant's servant, cut loose the cars following his own, and having resumed his proper place as a passenger, was injured by negligence on the part of the engine-driver; and it was held that his recovery was not barred because he had done an act of mere accommodation at the request of defendant's servant, and without hire.³ But where the passenger's injuries are clearly the result of his voluntary act in taking upon himself the performance of a servant's duty, the railway ought not to be held liable to him, and such action ought to be regarded as contributory negligence on the part of the passenger. In this view, the cases of *McI. R. R. v. Bolton*,⁴ and *P. P. Ry. v. Green*,⁵ would seem to have been wrongly decided.

218. The relation of carrier and passenger begins

¹ See also *B. & O. R. R. v. The State*, to use of Trainor, 33 Md. 542; *Abell v. W. M. R. R.*, 63 Md. 433, 21 Am. & Eng. R. R. Cas. 503.

² 55 Penna. St. 288.

³ See also *McI. R. R. v. Bolton*, Ohio St. , 21 Am. & Eng. R. R. Cas. 501; *P. P. Ry. v. Green*, 56 Md. 84, 6 Am. & Eng. R. R. Cas. 168; cf. *Degg v. M. Ry.*, 1 H. & N. 773; *Potter v. Faulkner*, 1 B. & S. 800, 101 E. C. L.; *Everhart v. T. H. & I. R. R.*, 78 Ind. 292, 4 Am. & Eng. R. R. Cas. 599; *Sherman v. H. & St. J. R. R.*, 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589.

⁴ Ohio St. , 21 Am. & Eng. R. R. Cas. 501.

⁵ 56 Md. 84, 6 Am. & Eng. R. R. Cas. 168.

when, a contract of carriage having been made, or the passenger having been accepted as such by the railway, he has come upon the railway's premises, or has entered upon any means of conveyance provided by the railway.¹ Thus, in *Brien v. Bennett*,² the issue being whether or not the plaintiff was a passenger, it was held that proof that the plaintiff, having held up his finger to the driver of the defendant's omnibus, and that the driver, having stopped to take him up, and just as the plaintiff was putting his foot on the step of the omnibus, had driven on, causing the plaintiff to fall, entitled the plaintiff to the verdict on that issue. So, in *Smith v. St. P. C. Ry.*,³ one was held to be a passenger who had hailed the driver of a street car, and for whom the car had been stopped, and who, while having one foot upon the step of the rear platform of the car, was in the act of opening its door when he was injured by a collision between that car and another car.

219. Of course, the mere purchase of a ticket does not make the purchaser a passenger; he must also come upon the railway's premises, or upon its means of conveyance before the relation can be said to have begun. Nor is it enough that he has come to the railway's station with the intention of taking passage by its train at some indefinite time in the future. He must come to the station a reasonable time before the departure of the train by which he is to travel.⁴ But if a person has

¹ *Brien v. Bennett*, 8 C. & P. 724, 34 E. C. L.; *Warren v. F. R. R.*, 8 Allen 227; *Davis v. C. L. R. R.*, 10 How. Pr. 300; *Gordon v. G. St. & N. R. R.*, 40 Barb. 546; *Smith v. St. P. C. Ry.*, 32 Minn. 1, 16 Am. & Eng. R. R. Cas. 310; *Allender v. C. R. R.*, 37 Iowa 264; *W. St. L. & P. Ry. v. Rector*, 104 Ill. 296; *C. R. R. v. Perry*, 58 Ga. 461; *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306; *H. & St. J. R. R. v. Martin*, 11 Bradwell 386; *sed. cf. I. C. R. R. v. Hudelson*, 13 Ind. 325.

² 8 C. & P. 724, 34 E. C. L.

³ 32 Minn. 1, 16 Am. & Eng. R. R. Cas. 310.

⁴ *Harris v. Stevens*, 31 Vt. 79.

the *bona fide* intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger, not only from the moment he enters upon the railway's premises, but also while *en route* to the station in an omnibus run by the railway to take passengers to their trains.¹

220. The relation of carrier and passenger having been constituted, continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the railway's premises; thus, one who has been accepted as a passenger, is entitled to protection as such while he is in the railway's station, journeying on its line, in transit from one means of conveyance to another provided by the railway, and while he is temporarily absent from the cars at a way station for a proper purpose;² but, in *State v. G. T. R. R.*,³ it is held, that a passenger, who temporarily leaves a train at a way station short of his destination, is, while absent from the train, not a passenger. And in *Johnson v. B. & M. R. R.*,⁴ it was held, that a passenger who, having in the course of a journey by rail, stopped over for a day at a way station, and while there having gone to the railway station for a purpose not directly connected with his journey, was not a passenger while at its station. So, in *Commonwealth v. B. & M. R. R.*,⁵ in the case of an indictment of the railway under the Massachusetts Statute of 1874,⁶ for negligently causing the death of a passenger, it was held, that one who had left the train while it was in motion had voluntarily ceased to be a passenger, and had thereby forfeited his right to protection in that

¹ *Buffett v. T. & B. R. R.*, 40 N. Y. 168.

² *Clussman v. L. I. R. R.*, 73 N. Y. 606; *J., M. & I. R. R. v. Riley*, 39 Ind. 568; *K. N. L. Packet Co. v. True*, 88 Ill. 608.

³ 58 Me. 176.

⁴ 125 Mass. 75.

⁵ 129 Mass. 500, 1 Am. & Eng. R. R. Cas. 457.

⁶ C. 372, § 163.

character. A person who has been rightfully ejected from the cars for misconduct or non-payment of fare, cannot become a passenger by subsequently entering the car and tendering his fare.¹ A passenger who has, by mistake, taken a wrong train, is, so far as regards protection from injury, a passenger on that train.²

221. The relation of carrier and passenger ends only when the journey contracted for has been concluded, and the passenger has left the railway's premises;³ or, if a reasonable time has elapsed after the arrival of the train at the passenger's destination, which was sufficient for the passenger to leave the railway premises.⁴

III. PERSONS OTHER THAN PASSENGERS TO WHOM THE RAILWAY IS LIABLE TO THE SAME EXTENT THAT IT IS LIABLE TO ITS PASSENGERS.

222. The general principle stated in section 208, determines the liability of railways to post-office employés carried under contract with the post-office, or under a statutory duty imposed upon the railway; thus, in *Collett v. L. & N. W. Ry.*,⁵ the declaration having averred that the defendant was bound by a statute to carry the mails together with any officer of the post-office department whom the postmaster-general should designate, that the plaintiff was so designated, that while being carried by the defendant, with the mails, he was in-

¹ *O'Brien v. B. & W. R. R.*, 15 Gray 20; *Hibbard v. N. Y. & E. R. R.*, 15 N. Y. 455; cf. *Dietrich v. P. R. R.*, 71 Penna. St. 432; *State v. Overton*, 4 Zab. 438.

² *C. C. & I. R. R. v. Powell*, 40 Ind. 37.

³ *P. C. & St. L. Ry. v. Krouse*, 30 Ohio St. 222.

⁴ *Imhoff v. C. & M. R. R.*, 20 Wise. 344. ⁵ 16 Q. B. 984, 71 E. C. L.

The persons, other than passengers, to whom the railway owes the same measure of duty which it owes to its passengers, are enumerated in section 140, and the general principle determining the liability of the railway to these several classes of persons is stated in section 208.

jured by the negligence of the defendant's servants, judgment was, on general demurrer, entered for the plaintiff, Campbell, C. J., saying, "the defendant's duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes; if they are bound to carry they are bound to carry safely;" and Patteson, J., adding, "the plaintiff's right to sue arises, not from any particular contract with the defendants, but from their general duty to carry the mails and officers;" and Erle, J., adding, "the defendants have a public duty to perform in conveying the servants of the public safely; the plaintiff has been injured by their neglect in the performance of that duty, and has a right of action in consequence."¹ In *P. R. R. v. Price*,² where a mail agent, while engaged in the performance of his duty on a train, had been killed by negligence on the part of the railway, the court held that he was not a passenger, but that he was "lawfully engaged" on the train within the terms of the Pennsylvania Act of 4th April, 1868, and that a recovery of damages for his death was barred by that act. Railways are also liable to the same extent in the cases of soldiers carried under contract with the government,³ and agents carried under contract with the express company employing them,⁴ and vendors of newspapers, refreshments, etc., who are permitted by railways to travel on their trains for the purpose of selling their wares to passengers;⁵ but a person accom-

¹ See, also, *Nolton v. W. R. R.*, 15 N. Y. 444; *Seybolt v. N. Y., L. E. & W. R. R.*, 95 Id. 562; *Hammond v. N. E. Ry.*, 6 S. C. 130; *H. & I. C. Ry. v. Hampton*, 64 Tex. 427, 22 Am. & Eng. R. R. Cas. 291.

² 96 Penna. St. 256.

³ *Truax v. E. R. R.*, 4 Lansing 198.

⁴ *Blair v. E. R. R.*, 66 N. Y. 313; *Chamberlain v. M. & M. R. R.*, 11 Wise. 238; *Penna. Co. v. Woodworth*, 26 Ohio St. 585.

⁵ *Commonwealth v. V. C. R. R.*, 108 Mass. 7; *Yeomans v. C. C. S. N. Co.*, 44 Cal. 71.

panying an express agent at his invitation,¹ and a news-boy riding on a train without the permission of the railway, and solely by the connivance of the train hands,² are to be regarded as trespassers, for the railway is no party to their presence on the train.

223. Upon the same principle, the railway is liable to the passenger of another railway whose cars are run over the line of the railway; thus, in *Grote v. C. & H. Ry.*,³ the defendant was held liable to the plaintiff, who, while being carried as a passenger in the cars of the S. & C. Ry. over the defendant's line (a rental being paid by the S. & C. Ry. to the defendant for the use of its line), was injured by the fall of a bridge which had been negligently constructed. So in *Reynolds v. N. E. Ry.*,⁴ where a passenger having taken a ticket from railway A for a journey over its line, and over the lines of railways B and C, was injured on the line of B, it was held that B was liable to him. So in *Dalyell v. Tyrer*,⁵ the plaintiff having contracted with a ferryman to be carried daily for a certain period was, while being ferried on one of those days by a boat and crew hired by the ferryman, injured by negligence on the part of that crew, and the master of the boat and crew was held liable to him.⁶

224. The same rule is applied in cases of injury to the passengers of another railway with whom a station is jointly occupied; thus, in *Tebbutt v. B. & E. Ry.*,⁷ the stations at Bristol of the M., the B. & E., and the G. W. railways were adjoining and open to one another,

¹ *M. P. Ry. v. Nichols*, 8 Kans. 505.

² *Duff v. A. V. R. R.*, 91 Penna. St. 458.

³ 2 Ex. 251.

⁴ Roscoe's N. P. 591, cited by Thesiger, L. J., in *Foulkes v. M. Ry.*, 5 C. P. D. 169.

⁵ 23 L. J. Q. B. 52, El. Bl. & El. 899, 96 E. C. L.

⁶ See also *Martin v. G. I. P. Ry.*, L. R. 3 Ex. 9; *Gill v. M. S. & L. Ry.*, L. R. 8 Q. B. 186; *Schopman v. E. & W. R. R.*, 9 Cush. 24; *W. St. L. & P. Ry. v. Peyton*, 106 Ill. 534.

⁷ L. R. 6 Q. B. 73.

and the plaintiff having come in by a train of the M. Ry., and intending to go on by the G. W. railway, was passing through the defendant's station on his way to the G. W. station when he was injured by the negligence of a servant of defendant in moving a truck laden with luggage, and a verdict having passed for the plaintiff a rule for a new trial was discharged.

225. The same rule is applied in cases of injuries to passengers of another railway at level crossings of the two roads, and in jurisdictions, where the rule in *Thorogood v. Bryan* is not enforced, negligence upon the part of the carrier constitutes no defence to the railway whose negligence is the proximate cause of the injury.¹ Upon the same principle in *Patterson v. W. St. L. & P. Ry.*,² a line owned by the P. R. R. being used by several companies under running powers granted by contract, the plaintiff, a passenger on a train of one of those companies, was held to be entitled to recover from another of the companies for injuries caused by the negligent displacement of a switch by a servant of the last-mentioned company.

226. The application of the same rule determines the liability of a railway to the passengers of another railway received by it for transportation in its cars; thus in *Foulkes v. M. D. Ry.*,³ the defendant company having running powers over the line of the S. W. Ry., and the plaintiff having bought at Richmond, on the line of the S. W. Ry., a ticket from the S. W. company which entitled him to be carried to Hammersmith, on the line of the M. D. Ry., and returned from there to Richmond, the two companies by arrangement dividing the proceeds of the sales of such tickets, and having been re-

¹ P. C. & St. L. R. R. v. Spencer, 98 Ind. 186, 21 Am. & Eng. R. R. Cas. 478.

² 54 Mich. 91, 18 Am. & Eng. R. R. Cas. 130.

³ 4 C. P. D. 267, 5 Id. 157.

ceived for his return journey as a passenger in a carriage of the defendant company, was, at the termination of that journey, injured in alighting at the Richmond station of the S. W. Ry. by reason of the carriage being unsuited to the station platform. After verdict for the plaintiff, a rule to set aside that verdict and to enter a verdict and judgment for the defendant was discharged by the Common Pleas Division, and the defendant's appeal was dismissed in the Court of Appeal. The judgments in both courts were put upon the ground that the defendant having permitted the plaintiff to travel by their train was bound to make provision for his safety, but Bramwell, L. J., said, in concluding his judgment, "if the contract had not been a contract with the defendants and all that could have been complained of was a non-feasance, I should hold that they were not liable." This doctrine does not seem to be reconcilable with the judgment in that case, nor with the drift of the authorities.

227. Those who, by the permission of the railway, come upon its premises to render personal assistance to arriving or departing passengers are not mere licensees, for the relation between the railway and its passengers extends to and protects those whom the railway permits to attend the passenger upon its premises. The railway may, if it chooses, exclude such attendants from its premises, or from any part thereof, but if it permits their presence it is bound to protect them to the same extent that it is bound to provide for the safety of its passengers; thus, in *McKone v. M. C. R. R.*,¹ the railway was held liable for injuries caused by the unsafe condition of its station surroundings to a husband who had come upon the railway's premises to meet his wife, who was a passenger upon an incoming train. So in Lan-

¹ 51 Mich. 601, 13 Am. & Eng. R. R. Cas. 29.

gan *v.* St. L., I., M. & S. Ry.,¹ the railway was held liable to a person who, having come to its station to see a friend off, was, while walking on the platform, struck in the back by the bumper of a moving engine, which bumper projected eighteen inches over the platform. So in *Stiles v. A. & W. P. R. R.*,² where the injured person had boarded a railway train, when it had stopped near a station, to look for his wife and child who were passengers on the train, it was held that although he was entitled to all the rights of a passenger, yet the proofs showed so clear a case of contributory negligence on his part that the railway was not to be held liable for his injuries.³ In *Tobin v. P. S. & P. R. R.*,⁴ this rule was held to render the railway liable for its negligence to a hackman who had driven a passenger to the railway station. *Lucas v. N. B. & T. R. R.*,⁵ does not contradict these authorities, for, in that case, the person injured having entered a car of the defendant at its station, not as a passenger, but for the purpose of assisting an infirm passenger, was injured in leaving the car after the train had started, and it was, therefore, a clear case of self-inflicted injury.

228. The same rule is applied in cases of injuries to the servants of another railway while upon the line or premises of the defendant in the performance of their duty to that other railway; thus, in *Vose v. L. & Y. Ry.*,⁶ a station being in the joint occupation of the defendant and the E. L. Ry., and the plaintiff's decedent, a blacksmith in the service of the E. L. Ry., while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of a train

¹ 72 Mo. 392, 3 Am. & Eng. R. R. Cas. 355.

² 65 Ga. 370, 8 Am. & Eng. R. R. Cas. 195.

³ See also *Doss v. M. K. & T. R. R.*, 59 Mo. 27; *Hamilton v. T. & P. Ry.*, 64 Tex. 251, 21 Am. & Eng. R. R. Cas. 336. ⁴ 59 Me. 183.

⁵ 6 Gray 65. See also *Griswold v. C. & N. W. R. R.*, Wise. , 23 Am. & Eng. R. R. Cas. 463. ⁶ 2 H. & N. 728.

of the L. & Y. Co. on that siding. The jury having found specially that the regulations for the management of the station were defective, and that no persons other than the defendants were negligent, the verdict was entered for the plaintiff, and a rule for a new trial was discharged. So in *Graham v. N. E. Ry.*,¹ the plaintiff, a guard in the service of the N. B. Ry., which had statutory running powers over the defendant's line, was, while engaged in the performance of his duty on a train of the N. B. Company, passing over the defendant's line, injured by his head coming in contact with a post which was in such proximity to the line as necessarily to endanger the safety of guards on the trains. The jury having found for the plaintiff, a rule for a new trial was discharged. So in *Snow v. H. R. R.*,² the W. R. R. having, by agreement, running powers over certain tracks of the defendant at D., and the plaintiff, a servant in the employment of the W. R. R., having been injured by a defect in the planks between the rails of the defendant's tracks, was held entitled to recover from the defendant. So in *C. R. R. v. Armstrong*,³ the defendant having running powers over the line of the P. & E. R. R., and the plaintiff's decedent, a servant of the P. & E. R. R., while travelling on its line in a hand-car for the purpose of going to the point where he was to repair a broken rail, having been killed by the negligent movement of a train of the defendant company, it was held that his connection with the P. & E. R. R. did not bar his recovery from the defendant. So in *Brown v. G. W. Ry.*,⁴ a collision having occurred at a railway grade crossing between trains of two lines, because of a failure of the air-brakes on one train to act, and because

¹ 18 C. B. N. S. 229, 114 E. C. L.

² 8 Allen 441.

³ 49 Penna. St. 186, 52 Id. 282.

⁴ 40 Up. Can. Q. B. 333, 2 Ont. Ap. Cas. 64, 3 Can. S. C. 159.

of the neglect of the servants on that train to apply the air-brakes at a distance from the crossing sufficient to permit the stoppage of the train by the use of its hand-brakes, the railway owning and operating that train was held liable to a servant of the other railway who was injured by the collision while engaged upon the other colliding train.¹ The same rule was applied in *Swainson v. N. E. Ry.*,² in the case of a signal man, one of a joint station staff, but engaged and paid by one company, and injured by the negligence of the servants of the other company, while in the discharge of his duties to both companies.³ The result of the authorities is, that where a line, or a station, is in the joint occupancy of two or more companies, the servants of each company are not servants of the other companies, nor fellow-servants with the servants of those other companies, but their right of recovery, in case of injury caused by negligence upon the part of those other companies, either in an original defective construction of their lines, as in Graham's case, or in a failure to maintain the line in an adequate condition of repair, as in Snow's case, or in the carelessness of their servants, as in Vose's, Armstrong's, Warburton's, and Brown's cases, is that not of a servant but of a passenger. In this class of cases, the injured persons are more than mere licensees. The relation between the railway whom they serve and the other railway, by whose negligence they are injured, is so far founded upon a valuable consideration, that it raises upon the part of that other railway an implied obligation that it will not be negligent as against those servants.

¹ See also *Warburton v. S. W. Ry.*, L. R. 2 Ex. 30; P., W. & B. R. R. v. The State, 58 Md. 372; *I. C. R. R. v. Frelka*, 110 Ill. 498, 18 Am. & Eng. R. R. Cas. 7; *Penna. Co. v. Gallagher*, 40 Ohio St. 637, 15 Am. & Eng. R. R. Cas. 341; *In re Merrill* (C. V. R. R.), 54 Vt. 200, 11 Am. & Eng. R. R. Cas. 680; *Zeigler v. D. & N. R. R.*, 52 Conn. 543, 23 Am. & Eng. R. R. Cas. 400.

² 3 Ex. D. 341.

³ See also *Abraham v. Reynolds*, 5 H. & N. 143.

229. The same rule is applied in cases of injury to consignors and consignees personally assisting in the delivery or reception of their freight. Thus, in *Holmes v. N. E. Ry.*,¹ it being the usage of business at a railway station for coal wagons to be shunted on a siding and there unladen by the shooting of their contents into cells beneath the siding, the consignees personally assisting in the operation, the plaintiff while, with the acquiescence of the railway's station-master, passing along a flagged way over the cells for the purpose of getting some coal from a wagon which had been consigned to him, was injured by the giving way of a flag, and a consequent fall into a cell; and a verdict having passed for the plaintiff, a rule to enter the verdict for the defendant for want of evidence of negligence was discharged, upon the ground that the relation between the consignee and the railway, and the acquiescence of the station-master in the consignee's action raised an implied warranty on the part of the railway, that its premises were reasonably safe, and rendered it liable for the consequences of a breach of that warranty; and in the Court of Exchequer Chamber, the order of the Exchequer Division was affirmed upon the ground stated in the judgments of the court below. So, in *Wright v. L. & N. W. Ry.*,² the same principle was applied by the Court of Appeal in the case of a consignee of cattle, who, while with the permission of the railway's station-master, assisting in the shunting of a car which had been consigned to him, was injured by the negligent movement of another car by the railway's servants, Coleridge, L. J., saying, "the defendants being bound by contract to deliver the heifer to the plaintiff, they, by their representative, the station-master, allowed the plaintiff to take part in the delivery,

¹ L. R. 4 Ex. 254, 6 Id. 123.

² L. R. 10 Q. B. 298, 1 Q. B. I. 252.

and they were, therefore, bound to see that he did not get injured by the negligence of their servants." So, in *A. V. R. R. v. Findlay*,¹ the plaintiff, a teamster, having gone to the defendant's station to receive a consignment of lime, and having brought his team up to the track upon the assurance of the station agent that no train would pass for half an hour, and a train having come unexpectedly and rapidly, and injured the plaintiff's horse, judgment upon a verdict for the plaintiff was affirmed in error.² But the railway is not liable to a volunteer who, while assisting a consignee in removing his freight, is injured by the breaking of a crane erected by the railway on its premises, and permitted to be used by the consignee, for the railway owes no duty to the volunteer.³ Nor is the railway liable to a consignee who is contributorily negligent, as, for example, in driving a wagon into a passage way on the side of a canal so narrow that in attempting to pass another wagon he is thrown into the canal;⁴ or in going on the line between the cars of a freight train for the purpose of uncoupling the cars;⁵ or in carelessly crossing the tracks in a railway yard;⁶ or in walking on the line in a railway yard in front of a locomotive and train which is obviously ready to move.⁷

¹ 4 Weekly Notes of Cases (Penna.) 438.

² See also *Foss v. C. M. & St. P. R. R.*, 33 Minn. 392, 19 Am. & Eng. R. R. Cas. 113; *Watson v. W. St. L. & P. Ry.*, 66 Iowa 164, 19 Am. & Eng. R. R. Cas. 114; *I. C. R. R. v. Hoffman*, 67 Ill. 287; *Newson v. N. Y. C. R. R.*, 29 N. Y. 383; *N. O., J. & G. N. R. R. v. Bailey*, 40 Miss. 395; *S. L. B. R. R. v. Lewark*, 4 Ind. 471; *Same v. Lynch*, 4 Ind. 494.

³ *Blakemore v. B. & E. Ry.*, 8 El. & Bl. 1035, 92 E. C. L. *In Heaven v. Pender*, 11 Q. B. D. 516, Cotton and Bowen, L. JJ., question the propriety of considering the plaintiff in Blakemore's case as a volunteer.

⁴ *Goldstein v. C. M. & St. P. Ry.*, 46 Wisc. 404.

⁵ *Burns v. B. & L. R. R.*, 101 Mass. 50.

⁶ *Rogstad v. St. P., M. & M. Ry.*, 31 Minn. 208, 14 Am. & Eng. R. R. Cas. 648.

⁷ *B. & O. R. R. v. Depew*, 40 Ohio St. 121, 12 Am. & Eng. R. R. Cas. 64.

230. The same rule is applied in cases of injury to persons using for hire, or under special contract, any portion of the railway's line or premises; thus, in *Marfell v. S. W. Ry.*,¹ a railway having parallel to its line a tramway, which was used by those of the public who paid tolls to the railway for drawing goods in trucks on the tramway, and which tramway crossed the railway's line at a point where there were swinging gates, and while the plaintiff's servants with a horse and truck were crossing the line, the horse, becoming frightened by an approaching train, swerved upon the line and was killed, and it was held that the railway was liable, for the plaintiff, by reason of his using the tramway for hire, was entitled to insist upon its being reasonably secure.

IV. THE MODIFICATION OF THE RULE IN PENNSYLVANIA BY STATUTE.

231. The application of the general rule, as stated in section 208, has been limited by statute in Pennsylvania, for the Act of 4 April, 1868,² provides "that when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé; provided, that this section shall not apply to passengers." The constitutionality of this statute has been sustained in *Kirby v. P. R. R.*,³ Agnew, C. J., delivering the judgment, as

¹ 8 C. B. N. S. 525, 98 E. C. L.

² Pam. Laws 1868, p. 58, 2 Pur. Dig. pl. 5.

³ 76 Penna. St. 506.

follows: "it may be conceded that the natural rights of men, among them that of personal security, are guarded by the Bill of Rights, and 'that all courts shall be open, and every man for an injury done him, in his lands, goods, person, and reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.' But in what respect does this law trench upon this guaranty, or, indeed, on any other in the Constitution? The person to be affected by it must be one *lawfully engaged or employed* on or about the road, etc. To be thus engaged he must be there *by his own consent*. He is, therefore, voluntarily there, to perform some act or business connected with the road or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law which governs the relation. He is not bound to assume the relation, and when he does he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the State, as the conservator of the lives, security, and property of her citizens. It is a police regulation, which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act of negligence does him the injury, the law says to him that the legal principle of *respondeat superior* shall have no place in this particular relation; that, as a matter of proper policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company, shall have just the same remedies for

injuries happening in the employment that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company for reasons of policy, can remove the imputation from the master, and let it remain with the servant, whose negligence causes the injury."

232. Paxson, J., states in his judgment in *Mulherrin v. D., L. & W. R. R.*,¹ that it is probable that the act was passed in view of the assertion in *C. R. R. v. Armstrong*,² of the well-settled rule of law, that where one railway grants to another railway running powers over its line, a servant of the one railway is not a fellow-servant of the servants of that other railway, and, therefore, not barred from recovering from that other railway for injuries caused by the negligence of its servants. But whatever may have been the reasons which induced the legislative mind to enact the statute, it is certainly an unjustifiable exercise of legislative power, and it ought to be strictly construed. An analysis of the act shows, that in order to bring any person within its purview it must be proven, first, that the person is not a servant of, or a passenger upon, the railway; second, that the injury must have occurred while the person injured was lawfully engaged, or employed, on or about the line, premises, or cars, of the railway, and that when these facts are proven the right of recovery of the person injured will be neither more nor less than that of a servant of the railway. The dictum of Gordon, J., in

¹ 81 Penna. St. 366.

² 49 Penna. St. 186.

Ricard *v.* N. P. R. R.,¹ that the words "engaged or employed" as used in the statute comprehend "every imaginable manner by which any one may, or might be, brought in, upon, or about, the roadbed, cars, or works of a railroad company," although quoted with approval by Paxson, J., in P. R. R. *v.* Price,² would seem to be disapproved of by the judgment of the court in the later case of Richter *v.* P. R. R.³ That dictum is also irreconcilable with the reasoning upon which the constitutionality of the statute is supported in Kirby *v.* P. R. R., as a police regulation forbidding individuals from knowingly undertaking a dangerous employment connected with a railway line, except upon the implied condition that they will hold the railway to no greater liability than that which it incurs with regard to its servants.

233. It has been held that the statute bars recovery, in the case of a plaintiff who, while engaged in the service of another party in loading coal on a siding which was in the sole possession and under the exclusive control of the railway, was injured by the disengagement from their engine of some cars which were not equipped with a sufficient number of train hands to control them, and which, running upon a down grade, came upon the siding, the switch connecting the siding with the main line having been left open by the negligence of the railway's servants;⁴ where the railway had running powers over the line of another company, and the plaintiff, a freight brakeman in the employment of that other company, having left his train to turn a switch, while walking on the line was run over by a train of the first-mentioned railway, of whose approach no notice was given;⁵

¹ 89 Penna. St. 195.

² 96 Penna. St. 267.

³ 104 Penna. St. 511.

⁴ Kirby *v.* P. R. R., 76 Penna. St. 508.

⁵ D. L. & W. R. R. *v.* Mulherrin, 81 Penna. St. 366.

where the plaintiff, having gone to a station to receive freight consigned to him, and having, by permission of the railway's agent, and for the purpose of unloading his freight, entered a car upon a siding, was injured by the negligence of the railway's servants in shunting cars to the siding;¹ where a person, while unloading freight from a ship lying at a wharf owned and controlled by the railway, was injured by the negligence of the railway's servants in permitting an unusual escape of steam from an engine and so frightening the plaintiff's horses;² where the plaintiff, being the employé of a coal dealer, and engaged in unloading cars upon a siding constructed by the dealer upon his own land, and used by the railway, not as part of its line, but only for the purpose of delivering coal to the dealer, was injured by a collision caused by the negligent shifting of cars from the defendant's main line;³ and where the plaintiff, a mail agent of the Post Office Department travelling on defendant's line in the performance of his duties as such mail agent, was injured by the negligence of the railway's servants in disobeying orders and thus causing a collision.⁴

234. The statute has been held not to bar recovery in the case of a plaintiff who, while employed in and about a rolling mill in hauling ashes in a barrow across a siding upon his employer's premises, found the way blocked by some empty cars unattached to any engine or train, and in uncoupling and attempting to move the cars was killed by a movement of the cars, caused by the negligence of an engine-driver of the defendant

¹ Ricard *v.* N. P. R. R., 89 Penna. St. 193.

² Gerard *v.* P. R. R., 12 Phila. 394; 5 Weekly Notes of Cases (Penna.) 251.

³ Cummings *v.* P., C. & St. L. R. R., 92 Penna. St. 82.

⁴ P. R. R. *v.* Price, 96 Penna. St. 256 (affirmed in 113 U. S. 219, on the ground that the record raised no question of which the Supreme Court of the United States could take cognizance on appeal from a State court).

in moving the cars without notice;¹ nor in the case of a servant of the owner of a lumber yard adjoining the railway line, in which yard there was a siding from the railway, who was killed by cars run on the siding and striking against a car with a defective brake and unblocked, which had by the negligence of the railway been permitted to remain on the siding.²

235. Some of these decisions seem to be open to criticism. In *Kirby v. P. R. R.*, the negligence upon the part of the railway was two-fold, first, in that the cars that did the injury were insufficiently equipped with train hands, and, second, in that the switch was negligently left open. If the plaintiff had been a servant of the railway he could not have recovered from the railway upon the second ground, for that was the negligence of his co-employés; but, although a servant, he could have recovered upon the first ground of negligence, for it was the duty of the railway to have its cars equipped with a sufficient number of train hands to prevent injury to other servants from that cause. It would seem, therefore, that in that case the statute ought not to have barred the plaintiff's recovery. The case of *Cummings v. P., C. & St. L. R. R.*, in which it was held that the plaintiff came within the terms of the statute, is not reconcilable with the case of *N. P. R. R. v. Kirk*, in which, upon a similar state of facts, a contrary conclusion was reached. In the first-mentioned case the *locus in quo* of the injury was a siding constructed by a coal dealer upon his own land, and used by the railway, not as a part of its line (as was the case in *Kirby v. P. R. R.*), but only for the convenience of the dealer in delivering coal to him. This statute

¹ *Richter v. P. R. R.*, 104 Penna. St. 511.

² *N. P. R. R. v. Kirk*, 90 Penna. St. 15, 1 Am. & Eng. R. R. Cas. 45.

ought to be repealed, for its only office is to relieve railways from paying a just compensation to persons injured, without fault on their part, by the negligence of the servants of the railway. In future judicial applications of the statute, it may, perhaps, be borne in mind, that to bar the plaintiff's recovery, it must be shown that, not being a passenger or a servant, he voluntarily entered upon an employment which exposed him to danger in the course of the operation of the railway, and that, if injured without fault on his part, he can recover, notwithstanding the statute, wherever, under like circumstances, a servant of the railway could recover.

V. THE GENERAL DUTY OF THE RAILWAY TO PASSENGERS.

The duty of the railway to its passengers, and to those to whom it owes the same measure of duty that it owes to its passengers, requires it to exercise the highest degree of care for, but does not make it an insurer of, their safety.

236. As Montague Smith, J., said, in *Readhead v. M. Ry.*,¹ "the law of England has, from the earliest times, established a broad distinction between the liability of common carriers of goods and of passengers." In the leading case of *Coggs v. Bernard*,² Holt, C. J., thus states the rule with regard to the liability of common carriers of goods and the reason for it. "The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the

¹ L. R. 4 Q. B. 379.

² 2 Ld. Raymond 918, 1 Sm. L. C. 291.

safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." It is obvious that neither the rule thus stated, nor the reason given for it, is applicable to carriers of passengers. In *White v. Boulton*,¹ Kenyon, C. J., at Nisi Prius in 1791, directed the jury that carriers were bound to carry their passengers "safely and properly." In 1809, in *Christie v. Griggs*,² Sir James Mansfield, C. J., held the carrier's duty to be, "that, as far as human care and foresight could go, he would provide safe conveyance." In *Harris v. Costar*,³ Best, J., held that the obligation to carry safely "meant that the defendants were to use due care." Innumerable *dicta* to a like effect might be quoted, but it is sufficient to cite the words of Grier, J., who said, in the leading case in the United States,⁴ that "when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents." The general rule, as thus stated, is supported by a multitude of authorities.⁵

¹ Peake 113.

² 2 Camp. 79.

³ 1 C. & P. 636, 11 E. C. L.

⁴ P. & R. R. R. v. Derby, 14 Howard 468.

⁵ *Christie v. Griggs*, 2 Camp. 80; *Bremner v. Williams*, 1 C. & P. 414, 11 E. C. L.; *Sharp v. Gray*, 9 Bing. 457; *White v. Boulton*, Peake 113; *Harris v. Costar*, 1 C. & P. 636, 11 E. C. L.; *Fowler v. Locke*, L. R. 7 C. P. 272, 9 Id. 751 n.; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Kopitoff v. Wilson*, 1 Q. B. D. 377;

237. Railways, nor being insurers of the safety of their passengers, nor liable for injuries to their passengers caused by an act of God, or resulting from inevitable accident, it would seem to follow that they could not reasonably be held answerable for injuries to their passengers resulting from such defects in their machinery or appliances as could not have been guarded against by the exercise of care on their part. Yet there has been some conflict of authority on this point. This question seems first to have been raised in *Ingalls v. Bills*,¹ where the plaintiff, a passenger on a coach, was injured by the breaking of an axletree of the coach by reason of a hidden flaw, which the most careful examination failed to discover. Hubbard, J., in a learned and soundly reasoned opinion, summed up the law in the proposition that "where the accident arises from a hidden and internal defect which a careful and thorough

Randall v. Newson, 2 Id. 102; *Hyman v. Nye*, 6 Id. 685; *White v. F. R. R.*, 136 Mass. 321; *Sales v. Western Stage Co.*, 4 Iowa 547; *Wilson v. N. P. R. R.*, 26 Minn. 280; *Warren v. F. R. R.*, 8 Allen 233; *Taylor v. G. T. Ry.*, 48 N. H. 229; *T. H. & W. R. R. v. Baddeley*, 54 Ill. 19; *Dunn v. G. T. Ry.*, 58 Me. 157; *Tuller v. Talbot*, 23 Ill. 357; *P. & C. R. R. v. Thompson*, 56 Id. 138; *I. & St. L. R. R. v. Horst*, 93 U. S. 291; *T. H. & I. R. R. v. Jackson*, 81 Ind. 20; *Sherlock v. Alling*, 44 Id. 184; *Penna. Co. v. Roy*, 102 U. S. 451; *M. R. R. v. Blakely*, 59 Ala. 477; *Tanner v. L. & N. R. R.*, 60 Id. 621; *Wheaton v. N. B. & M. R. R.*, 36 Cal. 593; *P. P. C. Co. v. Barker*, 4 Colo. 344; *Dewart v. Loomer*, 21 Conn. 253; *Flinn v. P., W. & B. R. R.*, 1 Houston (Del.) 499; *U. P. R. R. v. Hand*, 7 Kans. 392; *Sherley v. Billings*, 8 Bush. 151; *Black v. C. R. R.*, 10 La. An. 38; *B. & O. R. R. v. Worthington*, 21 Md. 275; *McClary v. S. C. P. R. R.*, 3 Neb. 54; *Laing v. Colder*, 8 Penna. St. 482; *Meier v. P. R. R.*, 64 Id. 230; *P. & R. R. R. v. Anderson*, 94 Id. 351; *I. & G. N. R. R. v. Halloren*, 53 Tex. 46; *V. C. R. R. v. Sanger*, 15 Grat. 236; *P. & R. R. R. v. Derby*, 14 How. 463; *Steamboat New World v. King*, 16 Id. 469; *N. Y. C. R. R. v. Lockwood*, 17 Wall. 357; *Stockton v. Frey*, 4 Gill 406; *The State v. B. & O. R. R.*, 24 Md. 84; *McElroy v. N. & L. R. R.*, 4 Cush. 400; *Schopman v. B. & W. R. R.*, 9 Id. 24; *Knight v. P. S. & P. R. R.*, 57 Me. 202; *Fairchild v. C. S. Co.*, 13 Cal. 604; *Jamison v. St. J. & S. C. R. R.*, 55 Cal. 593, 3 Am. & Eng. R. R. Cas. 350; *P. C. & St. L. R. R. v. Williams*, 74 Ind. 462, 3 Am. & Eng. R. R. Cas. 457; cf. *L. C. Ry. v. Weams*, 80 Ky. 420, 8 Am. & Eng. R. R. Cas. 399.

¹ 9 Metc. 1.

examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." In *Readhead v. Midland Ry.*,¹ the plaintiff, a passenger by the defendant's line, was injured by the derailment of the carriage in which he was riding, caused by the breaking of the tire of a wheel from a hidden flaw, which flaw it was proven was not possible of discovery by the exercise of the greatest care, either on the part of the railway company or of the manufacturer of the wheel. The judge left it to the jury to say whether on the evidence they were satisfied that the injury to the plaintiff was due to the negligence of the defendants. The jury found for the defendants, and judgment was entered on the verdict for them, and affirmed in the Exchequer Chamber on the ground that carriers of passengers are not answerable as insurers for the safety of their vehicles and appliances, but that they are liable only for such accidents as may happen from any defect therein which might have been prevented by the exercise of due care on their part, and that "the duty to take due care, however widely considered or however rigorously enforced, will not subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected." Blackburn, J., dissented in the court below, conceding that the rule in *Coggs v. Bernard* was not applicable, and that the

¹ L. R. 2 Q. B. 412, 4 Id. 379.

carrier of passengers is not an insurer, but holding that the obligation of the carrier to provide a vehicle reasonably fit for the journey is absolute, and that a failure to fulfill that obligation is sufficient to make him liable for all the consequences, for the reason that the vehicle being supplied and selected by the carrier, the passenger having no means of examining the carriage and no voice in its selection, there is an implied warranty that the carriage is reasonably fit. In *Alden v. N. Y. C. R. R.*,¹ the Court of Appeals of New York took the same view as that expressed by Blackburn, J., but the later cases in New York have followed the rule as laid down by the Court of Exchequer Chamber. In *Meier v. P. R. R.*,² the injury resulted from a hidden flaw in the axle, and judgment for the defendant was affirmed by the Supreme Court, Agnew, J., saying: "Absolute liability requires absolute perfection in machinery in all respects, which is impossible. The utmost which human knowledge, human skill, and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways unless they possess a capital and surplus which will enable them to add a new element to their business, that of insurers."³

238. It is, therefore, the duty of the railway to exercise care in the provision of good and sufficient material, to employ skilled engineers and contractors, and to follow correct methods in the original construction, inspection, and subsequent maintenance in repair of its

¹ 26 N. Y. 102.

² 64 Penna. St. 225.

³ See also *Gilson v. J. C. H. Ry.*, 76 Mo. 282, 12 Am. & Eng. R. R. Cas. 132; *Smith v. C. M. & St. P. Ry.*, 42 Wise. 520; *De Graff v. N. Y. C. & H. R. R. R.*, 76 Id. 125; *McPadden v. N. Y. C. R. R.*, 44 Id. 478; *Caldwell v. N. J. S. Co.*, 47 Id. 290; *Carroll v. S. J. R. R.*, 58 Id. 126; *G. R. & I. R. R. v. Boyd*, 65 Ind. 526; *Lemon v. Chanslor*, 68 Mo. 340; *Sawyer v. H. & St. J. R. R.*, 37 Id. 240.

station approaches, station buildings, station platforms, and of the embankments, bridges, cuttings, tunnels, levels, roadbed, rails, and switches, which constitute its line, and of the engines and cars which it uses in the transportation of its passengers; and it is also the duty of the railway to adopt and put into operation a system for the operation of its line, to make and enforce reasonable rules and regulations for the safety of its passengers, to employ a sufficient number of servants, to select its servants carefully, to make and enforce regulations for their guidance, and to use in the operation of its line every reasonable precaution for the safe transportation of its passengers. A failure of duty in any of these respects will render the railway liable; thus, where a bridge or an embankment has broken down, its fall must, in the absence of *vis major*, have resulted from want of skill on the part of the engineer who planned it, or on the part of the contractor who built it, or from a failure to adopt the best method of construction or a neglect to use materials of adequate strength, or from a failure to maintain the bridge or embankment in a safe condition. To relieve the railway from responsibility for such an accident, it must appear that there was no negligence in any one of these respects, and it is not enough to show that the bridge was planned by a competent engineer;¹ thus, in *Grote v. C. & H. Ry.*,² where a passenger was injured by the fall of a bridge, which had been built by a competent engineer engaged by the defendant, at the trial, Williams, J., directed the jury "that the question was whether the bridge was constructed and maintained with sufficient care and skill and of reasonably proper strength with regard to the

¹ *Grote v. C. & H. Ry.*, 2 Ex. 251; *P. & R. R. R. v. Anderson*, 94 Penna. St. 351, 6 Am. & Eng. R. R. Cas. 407.

² 2 Ex. 251.

purpose for which it was made, and that if they should think not, and that the accident was owing to any such deficiency, the plaintiff would be entitled to recover." A verdict having been found for the plaintiff, a rule for a new trial upon the ground of misdirection was refused, Pollock, C. B., holding the test of freedom from liability to be whether the defendant had employed a person "fully competent to the work, and the best method is adopted and the best materials are used," and adding: "it cannot be contended that the defendants are not responsible for the accident merely on the ground that "they have employed a competent person to construct the bridge."

239. The same principles are applicable in cases where injury to a passenger results from the failure of any means of transportation, whether resulting from original defects in construction or from subsequent wear and tear in operation.¹ While the railway has a right to assume that rolling stock bought from a reputable manufacturer is reasonably sufficient, and is not to be held liable for latent defects in such rolling stock, which could not have been discovered by the railway or by the manufacturer, by any reasonable and practicable means of inspection,² yet where injury to a passenger results from an imperfection in the line, or in the means of transportation, due to the negligence of the party who built the same and furnished it to the railway, the railway is liable therefor.³

240. Upon the principle pointed out in *Mersey Docks Trustees v. Gibbs*,⁴ if knowledge of the existence of a

¹ *Manser v. E. C. Ry.*, 3 L. T. N. S. 585.

² *G. B. & I. R. R. v. Huntley*, 38 Mich. 537.

³ *Grote v. C. & H. Ry.*, 2 Ex. 251; *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Hegeman v. W. R. Corporation*, 13 N. Y. 9; *Readhead v. M. Ry.*, L. R. 4 Q. B. 379; *Burns v. C. & Y. Ry.*, 13 C. L. (N. S.) 543.

⁴ L. R. 1 H. L. 93.

cause of mischief makes the railway responsible for the injury it occasions, it will be equally responsible when, by its negligence, the existence of that cause of mischief is not known to it, and, of course, in such a case, the negligence of the superintending officials of a railway must be held to be negligence upon the part of the railway.

241. It is the duty of the railway to vigilantly inspect its line and buildings, and, as has been shown, the fact that an injury was immediately caused by an act of God, will not relieve the railway, if that injury could have been guarded against by the exercise of care on the part of the railway. It is also the duty of the railway, not only to test its machinery and appliances before they are put into use, but also to test them from time to time subsequently, in order that it may be known if they are deteriorating by wear and tear.¹ The criterion of negligence in such cases is, not whether the particular defect, which was the cause of the injury, could possibly have been detected by the use of scientific means of investigation, but whether the defect ought to have been observed practically and by the use of ordinary and reasonable care.² So in the case of cars received by the railway from another line for transportation over its line, the duty of the railway requires it to subject such cars to as thorough an inspection as the necessary exigencies of the traffic permit; thus, in *Richardson v. G. E. Ry.*³ the plaintiff, a passenger on the defendant's line, had been injured by a collision caused by the breaking of the axle of a coal truck, resulting from a crack which could have been discovered if the axle had been

¹ *Manser v. E. C. Ry.*, 3 L. T. N. S. 585; *T. & St. L. R. R. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. R. Cas. 475.

² *Stokes v. E. C. Ry.*, 2 F. & F. 691; *Robinson v. N. Y. C. & H. R. R. R.*, 9 Fed. Rep. 877, 20 Blatch. 338.

³ *I. R. 10 C. P. 486*, 1 C. P. D. 342.

scraped clean of dirt, and had been subjected to a minute examination. The line of the Midland Railway connected with the defendant's line at Peterborough, and under a statute,¹ the defendants were bound to receive and forward carriages and trucks delivered to them by the Midland Company, and twenty to thirty thousand of such trucks were received at that junction weekly and forwarded. When this particular truck was brought on the defendant's line at Peterborough certain defects, in no way connected, however, with the defect which ultimately caused the accident, were perceptible, and such of the repairs as could be made were made. The exigencies of traffic prevented the defendant from minutely examining the axle. The jury found specially that the defect which caused the accident was discoverable by careful examination, that it was not the duty of the defendants to examine the axle, but that it was their duty to require from the wagon company some strict assurance that it had been thoroughly examined and repaired. The judge directed a verdict for the defendants, but the Court of Exchequer entered judgment for the plaintiff upon the ground that the defendants were negligent in not ascertaining that proper examination had been made before the truck was allowed to proceed. In the Court of Appeal, however, this judgment was reversed upon the ground that the defendants were not bound to do more than had been done in the way of examining the truck under the circumstances of the case, and that as the defects which were discovered were unconnected with the particular defect causing the accident, there was nothing to impose upon the defendants the duty of making a more minute examination than the exigencies of the traffic permitted.

242. The railway is, therefore, liable for negligence

¹ Sec. 92 of 8 and 9 Vict. chap. 20.

in the original construction, or subsequent maintenance of its roadway,¹ or of its rails,² or of its ties,³ or of its bridges,⁴ or of its embankments,⁵ or of its level crossings of other lines,⁶ or of its switches,⁷ or of its rolling stock, including cars,⁸ car axles,⁹ car brakes,¹⁰ car wheels,¹¹ and locomotives.¹²

243. The duty of the railway extends to all its means of transport, whether the particular means which proves to be deficient be, or be not, at the time of the injury,

¹ G. W. Ry. v. Braid, 1 Moo. P. C. N. S. 101; P., C. & St. L. R. R. v. Williams, 74 Ind. 462; O'Donnell v. A. V. R. R., 59 Penna. St. 259; V. C. R. R. v. Sanger, 15 Gratt. 230; Mattison v. N. Y. C. R. R., 35 N. Y. 487; P., P. & J. R. R. v. Reynolds, 88 Ill. 418.

² Brignoli v. C. & G. E. R. R., 4 Daly 182; M. S. & N. J. R. R. v. Lantz, 29 Ind. 528; C., C. C. & I. Ry. v. Newell, 75 Ind. 542, 8 Am. & Eng. R. R. Cas. 377; George v. St. L., I. M. & S. R. R., 34 Ark. 613, 1 Am. & Eng. R. R. Cas. 294; McPadden v. N. Y. C. R. R., 44 N. Y. 478; Reed v. N. Y. C. R. R., 56 Barb. 493.

³ P., C. & St. L. R. R. v. Thompson, 56 Ill. 138; T. & P. R. R. v. Hardin, 62 Tex. 367, 21 Am. & Eng. R. R. Cas. 460.

⁴ Grote v. C. & H. Ry., 2 Ex. 251; T. W. & W. Ry. v. Conroy, 68 Ill. 560; Oliver v. N. Y. & E. R. R., 1 Edm. S. C. 589; Locke v. S. C. & P. Ry., 46 Iowa 109; K. P. Ry. v. Miller, 2 Colo. 442; Jamison v. St. J. & S. C. R. R., 55 Cal. 593, 3 Am. & Eng. R. R. Cas. 350; B. S. O. & B. R. R. v. Rainbolt, 99 Ind. 551, 21 Am. & Eng. R. R. Cas. 466; D. & W. R. R. v. Spicker, 61 Tex. 427, 21 Am. & Eng. R. R. Cas. 160.

⁵ Henley v. H. R. R., 1 Edm. S. C. 359; P. & R. R. R. v. Anderson, 94 Penna. St. 351; I. & G. N. R. R. v. Halloren, 53 Tex. 4th, 3 Am. & Eng. R. R. Cas. 343.

⁶ Graham v. G. W. Ry., 41 Up. Can. (Q. B.) 324.

⁷ N. Y., L. E. & W. R. R. v. Daugherty, 11 Weekly Notes of Cases (Penna.) 437; P. & R. I. R. R. v. Lane, 83 Ill. 449; B. & O. R. R. v. Worthington, 21 Md. 275; McElroy v. N. & L. R. R., 4 Cush. 400; Smith v. N. Y. & H. R. R., 19 N. Y. 227; Caswell v. B. & W. R. R., 98 Mass. 194.

⁸ Penna. Co. v. Roy, 102 U. S. 451, 1 Am. & Eng. R. R. Cas. 225; C., C. C. & I. R. R. v. Walrath, 38 Ohio St. 461.

⁹ Hegeman v. W. R. R., 13 N. Y. 9; Alden v. N. Y. C. R. R., 26 N. Y. 102; McPadden v. Same, 44 Id. 478; G. R. & I. R. R. v. Boyd, 65 Ind. 525; Richardson v. G. E. Ry., L. R. 10 C. P. 486, 1 C. P. D. 342.

¹⁰ N. Y., L. E. & W. R. R. v. Daugherty, 11 Weekly Notes of Cases (Penna.) 437; Costello v. S. & R. R. R., 65 Barb. 92.

¹¹ T. W. & W. R. R. v. Beggs, 85 Ill. 80; Readhead v. M. Ry., L. R. 2 Q. B. 412, 4 Id. 379; Meier v. P. R. R., 64 Penna. St. 225.

¹² Robinson v. N. Y. C. & H. R. R. R., 20 Blatcf. 338; Manser v. E. C. Ry., 3 L. T. N. J. 585.

under the management of the railway, or of a third party;¹ thus in *John v. Bacon*,² the defendant having contracted to carry the plaintiff by steamer from Milford Haven to Liverpool, the mode of transit provided being that passengers should go on board of a hulk, owned by a third party, and moored in the harbor of Milford Haven, and thence embark on the steamer when it should stop *en route* from Haverford West. The plaintiff, in descending from the hulk to the steamer, fell into a hatchway in the hulk, negligently left unguarded, and after a verdict for the plaintiff a rule for a new trial was discharged, the ground of decision being that the carrier was answerable for any inadequacy in the means of transit resulting from negligence on his own part, or on the part of the person providing the particular means whose defective condition was the cause of injury to the passenger. So in *Knight v. P. S. & P R. R.*,³ a railway which had contracted to carry a passenger part way by train and part way by steamboat, was held liable to him for injuries caused by a failure to maintain in good repair the wharf over which the passenger was compelled to pass in going from the train to the steamboat. So in *V. & M. R. R. v. Howe*,⁴ the wreck of a freight train having stopped the progress of a passenger train at night, the passengers were directed by the railway's servants to leave their train and to walk to another train beyond the wreck, crossing on a plank over a ditch, there being no light at the plank, and no notice being given of the approach to it, and the plaintiff in so doing fell and was injured, and the railway was held liable therefor.⁵ So in *Buffett v. T. & B.*

¹ *John v. Bacon*, L. R. 5 C. P. 437; *Knight v. P. S. & P. R. R.*, 56 Me. 227; *V. & M. R. R. v. Howe*, 52 Miss. 202; *Jamison v. St. J. & S. C. R. R.*, 55 Cal. 593, 3 Am. & Eng. R. R. Cas. 350.

² L. R. 5 C. P. 437.

³ 56 Me 234.

⁴ 52 Miss. 202.

⁵ Upon the same principle it was held in *Northrup v. Ry. Pass. Assurance*

R. R.,¹ a railway was held liable to a passenger for injuries received in a railway omnibus while on his way to the railway station, and in *N. J. R. R. v. Palmer*,² a New Jersey railway was held liable for injuries received by a passenger while crossing on a ferry boat from New York to Jersey City.

244. Railways are also liable for injuries received by their passengers in sleeping-cars and other cars run by the railway as a part of its train, although such cars may be owned and manned by an independent corporation, and although the passenger may have specially contracted with that independent corporation for the privilege of riding in such car. Thus, in *Penna. Co. v. Roy*,³ the plaintiff, having purchased a ticket from the defendant, and become a passenger on its line, also purchased a ticket from the Pullman Palace Car Co., and having taken a seat in a car of the latter company, which was run as part of a train of the defendant, was injured by the falling of a berth in the car, resulting either from a defective construction of the car, or from negligence on the part of the servants in charge of the car. Judgment upon a verdict for the plaintiff was reversed for an error in the court below in admitting irrelevant evidence; but the liability of the defendant to the plaintiff was thus clearly stated by Harlan, J.: "the duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was

Co., 43 N. Y. 516, that the personal representatives of a person injured in the course of a journey by a connecting railway and steamboat line, by a fall on a slippery sidewalk while walking from steamboat to train, could recover under a policy stipulating for indemnity against injury "when caused by any accident while travelling by public conveyances, etc."

¹ 40 N. Y. 168.

² 47 room (N. J.) 90.

³ 102 U. S. 451.

discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor, and porter, were, in law, the servants and employés of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."¹ So, in *Thorpe v. N. Y. C. & H. R. R.*,² a passenger, being unable to obtain a seat in any car of the train other than the drawing-room car (which was not owned nor manned by the railway), seated himself in that car,

¹ See also *C. C. & I. R. R. v. Walrath*, 38 Ohio St. 461, 8 Am. & Eng. R. R. Cas. 371; *Kinsley v. L. S. & M. S. R. R.*, 125 Mass. 54.

² 76 N. Y. 402.

and, having refused to pay the extra fare demanded for a seat in that car, he was assaulted by the porter in charge of that car, and the railway was held liable to the passenger.

VI. THE DUTY OF THE RAILWAY AS TO THE ADOPTION OF IMPROVED APPLIANCES AND METHODS OF OPERATION.

The duty of the railway to its passengers requires it to adopt such improved appliances and methods of operation as, having been tested and found to materially contribute to the safety of railway operations, are in practical use, and can be in fact adopted.

- 245. The standard of railway efficiency changes from day to day with the progress of discoveries in science and inventions in the arts, and that system and those appliances of operation, whose adoption and application a few years ago were regarded as the full performance of the railway's duty to its passengers would be, to-day, considered, in the practice of well-managed railways, to fall far short of an adequate performance of that duty. It is obviously within the scope of treatises upon engineering and upon railway operation, and not within the scope of a law book, to prescribe the particular system and appliances which, according to the standard of to-day, ought to be enforced and used by railways, but it may be proper to notice here certain practical points which railway experience has, up to this time, established. The first point is the necessity of an intelligent financial administration based upon sound principles, for a railway which is under the pressure of chronic pecuniary embarrassment cannot be as efficiently operated as one whose earnings exceed its necessary disbursements for operating expenses, maintenance of line and rolling stock, and payment of interest upon funded debt, to say nothing of dividends to shareholders. If

its embarrassments are so great as to involve the creation of a floating debt, incurred for operating expenses, and especially if its employés are not promptly and adequately paid, it is obvious that the due maintenance of line and rolling stock will be neglected, and that its service will be disorganized. The next point is the necessity of the organization of the service of the line on a comprehensive system. It needs no argument to show that the employés of a railway which undertakes to move a large volume of traffic are so many in number, and their duties are so various, and those duties require, for their right performance, so much intelligence and concentration of purpose that the employés must not only be adequately remunerated, and have the added stimulus of anticipated promotion as a reward for faithful service, and of prompt punishment for their non-performance of duty, but they must also be organized, trained, subjected to discipline, and controlled in their action by wisely framed regulations which will, as far as possible, minimize the exercise of individual discretion by subordinates. The next point is that a thorough and vigilant inspection of the line and a free use of the telegraph in operating it, especially if the block system be adopted and enforced, will, to a great extent, diminish the danger of collision on the line with either moving or stationary obstructions other than such as necessarily result from want of fencing and the frequency of grade crossings; and automatic train brakes will, if obstructions be observed, enable the train to be brought to a speedy stop, and the modern increased solidity of the cars, and their close and rigid coupling will, if the obstruction be met, prevent the breaking up or telescoping of the cars.¹ There are many other points that might be

¹ Railway science has not yet solved the problem of heating cars in such a manner as to avoid the danger from fire in cases of derailment.

noted, such as the use of guard rails on bridges and embankments; the flooring of bridges, so as to prevent the falling of derailed engines or cars upon the trusses of the bridge; the connection of sidings with the main line tracks so that a train must back in order to go upon the siding; the locking of sidings so that a train cannot be heedlessly moved from the siding to the line; the marking of ends of trains by flags and lights; the guarding of switches by automatic targets and lights, and the operation of the line upon the block system, and by the use of interlocking signals whose normal condition is danger, and which can only be moved to safety by levers worked in the block houses.¹ Yet it cannot be laid down as a general rule of law that the duty of every railway to its passengers requires it to adopt in its entirety the system of operation and the appliances to which reference has been made, or any other system or appliances, but it can only be said, that if it be proven that any particular appliance or method having been tested and found to materially contribute to the safety of railway operations, is in practical use, could have been adopted by the railway, and if adopted would have prevented the injury to the plaintiff, it is then for the jury to determine, whether or not the failure to adopt that particular appliance or method was, under all the circumstances of the case, negligence upon the part of the railway.² The rule on this subject is well illustrated

¹ See Barry's "Railway Appliances;" Adam's "Notes on Railroad Accidents."

² *Freemantle v. L. & N. W. Ry.*, 10 C. B. N. S. 95, 100 E. C. L.; *Ford v. L. & S. W. Ry.*, 2 F. & F. 730; *Hegeman v. Western R. R. Corporation*, 13 N. Y. 9; *Smith v. N. Y. & H. Ry.*, 19 Id. 127; *Brown v. N. Y. C. Ry.*, 34 Id. 404; *Taylor v. Ry.*, 48 N. H. 304; *B. & O. Ry. v. State*, 29 Md. 252, Id. 420; *Warren v. Fitchburg Ry.*, 8 Allen 227; *LeBaron v. East Boston Ferry Co.*, 11 Id. 312; *Meier v. P. R. R.*, 64 Penna. St. 225; *F. & B. Turnpike Co. v. P. & T. R. R.*, 54 Id. 345; *L. & B. R. R. v. Doak*, 52 Id. 379; *N. Y., L. E. & W. R. R. v. Daugherty*, 11 W. N. C. 437; *I. & G. N. Ry. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. R. Cas. 343; *Bowen v. N. Y. C. R. R.*, 18 N.Y. 408; *K. C. R. R. v. Thomas*,

by the case of *Freemantle v. L. & N. W. Ry.*,¹ in which the general obligation of the railway as to the adoption of improved appliances was discussed with special reference to injury to property caused by fire communicated by sparks escaping from an engine. There was contradictory evidence in the cause as to the mode of construction of the engine, the sparks from which caused the fire, as to the sufficiency of its appliances for the prevention of the emission of sparks, and as to the possibility of preventing their emission by the use of appliances other than those which were used. Williams, J., directed the jury that the railway "in the construction of their engines are not only bound to employ all due care, and all due skill for the prevention of mischief occurring to the property of others by the emission of sparks or any other cause, but they are also bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as, under the circumstances, it is reasonable to require the company to adopt. For example, if the danger to be avoided were insignificant, or very unlikely to occur, and the remedy suggested were very costly or very troublesome, or such as interfered materially with the efficient working of the engine, then you will have to say whether it could reasonably be expected that the company should adopt such a remedy for such an evil. On the other hand, if the risk were considerable, and if the expense or trouble or inconvenience of providing the remedy is not great, in proportion to the risk, then you would have to say whether the company could reasonably be excused from

79 Ky. 160, 1 Am. & Eng. R. R. Cas. 79; *Randall v. B. & O. R. R.*, 109 U. S. 478; *Bartley v. G. R. R.*, 60 Ga. 182; *N. & J. R. R. v. McNeil*, 61 Miss. 434, 19 Am. & Eng. R. R. Cas. 518.

¹ 10 C. B. N. S. 95, 100 E. C. L.

availing themselves of such a remedy, because it might, to some extent, be attended with cost or other disadvantage to themselves." After a verdict for the plaintiff, a rule for a new trial on the ground of misdirection was refused.

246. It is said in some cases, that the duty of the railway does not require it, for the sake of making travel on its road free from peril, to incur a degree of expense which would render the operation of its line impracticable;¹ yet it may be questioned whether the cost of the adoption of new appliances or modes of operation, can be taken into consideration as an element in determining the duty of the railway, for if their adoption be necessary to the safe operation of the line, the railway ought to adopt them whatever their cost.

247. The extent of the application of this rule is, of course, dependent on the facts of the particular case. A newly constructed railway line, especially if laid out through a thinly settled territory, moving but little traffic, and running its trains at a low rate of speed, cannot be expected to be either equipped or operated in precisely the same manner as is necessary in the case of a railway which moves a large volume of traffic, through a settled country, and which runs its trains at a high rate of speed. It may well be held that the last-mentioned railway is negligent if it fails to adopt every appliance and every method of operation which has been proved to conduce to the safety of passengers; while in the case of the first-mentioned railway, its appliances and methods of operation need only be such as the experience of well-managed railways has shown to be essential to the safe operation of such a line. If any more strin-

¹ P., C. & St. L. R. R. v. Thompson, 56 Ill. 138; K. C. R. R. v. Thomas, 79 Ky. 160, 1 Am. & Eng. R. R. Cas. 79.

gent rule than this is enforced, all railways must either become insurers of the safety of their passengers or cease their operations. If adequate tests of trial and use have shown that any particular appliance or method of operation will materially tend to secure the safety of passengers, it may well be held that the failure to adopt it is negligence on the part of the railway. But railways are not to be expected to avail themselves of every new invention that is brought to their notice. The suggested improvement must have passed beyond the stage of experiment, and its theoretical sufficiency must have received the seal of a recognized practical efficiency before a railway can be held negligent for failing to adopt it. While on the one hand the evidence of this recognition cannot be found in the fact that one or even some railways have adopted the particular appliance, so, on the other hand, the fact that other railways have not adopted it is not conclusive proof that it ought not to have been adopted in the particular case; and the test in any such case is, whether or not the particular appliance is of recognized efficacy, and, under like conditions, in general use by well-managed railways. In the application of these principles it is to be borne in mind, that, in order to hold the railway liable for negligence in failing to adopt and put into practical operation any specific appliance or method of operation, it must be shown that the adoption of the particular appliance or method of operation would have prevented the injury to the plaintiff, and that a well-managed railway would, having regard to the situation of the particular railway and the volume of traffic which it moved, have adopted the particular appliance.

VII. RAILWAY REGULATIONS AS AFFECTING PASSENGERS.

248. It is both the right and the duty of the railway to make regulations for the safe conduct of its business, but those regulations must be reasonable in themselves and must be so published, that all persons who are to be affected thereby, may have an opportunity of learning the existence and effect of such regulations.¹ Where the regulations are, in themselves, reasonable, and have been properly published, the passenger is bound to inform himself as to their effect, and he must conform thereto;² thus, in *Sullivan v. P. & R. R. R.*,³ Woodward, J., said, the passenger's "consent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars, and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in producing the mischief."

249. There is some conflict in the cases upon the question as to the determination of the reasonableness of any particular regulation by the court or by the jury. In some cases⁴ it is held, that it is for the court to determine whether any particular regulation is reasonable. In other cases it is held, that the jury is the appropriate tribunal for the determination of that ques-

¹ *McDonald v. C. & N. W. R. R.*, 26 Iowa 124; *Sullivan v. P. & R. R. R.*, 30 Penna. St. 238; *P. R. R. v. Zebe*, 33 Id. 326; *P. R. R. v. McClurg*, 56 Id. 294; *Powell v. P. R. R.*, 32 Id. 414; *C. R. R. v. Green*, 86 Id. 421; *O'Donnell v. A. V. R. R.*, 59 Id. 239; *Creed v. P. R. R.*, 86 Id. 139; *B. & M. R. R. v. Rose*, 11 Neb. 177, 1 Am. & Eng. R. R. Cas. 253.

² *Britton v. A. & C. A. L. Ry.*, 88 N. C. 536, 18 Am. & Eng. R. R. Cas. 391; *B. & M. R. R. v. Rose*, 11 Neb. 177, 1 Am. & Eng. R. R. Cas. 253.

³ 30 Penna. St. 238.

⁴ *Hibbard v. N. Y. & E. R. R.*, 15 N. Y. 455; *L. & N. R. R. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. R. Cas. 347.

tion.¹ The last cited cases would seem to enunciate the sounder doctrine, especially in cases where the railway has not been by statute empowered to impose such regulations upon its passengers, for there is no analogy between railway regulations as affecting passengers, who are strangers to the railway corporation and ordinary corporate by-laws as affecting members of the corporation. Whether or not any particular railway regulation, as affecting the action of a passenger, imposes a proper restriction upon that passenger's independence of action, can only be determined upon a consideration of the circumstances of the particular case, and for such a consideration the jury, rather than the judge, would seem to be the proper tribunal. The following regulations have been held to be reasonable: requiring passengers to enter the cars only from the station platform;² prescribing the place and manner of leaving the cars;³ forbidding passengers to ride in baggage cars, etc.;⁴ forbidding passengers from putting their arms out of car windows;⁵ forbidding passengers to ride on platforms of cars;⁶ providing that specified trains shall not stop at particular stations;⁷ forbidding passengers to ride on freight trains;⁸ permitting passengers to ride on freight trains only upon certain specified conditions.⁹

¹ *Jencks v. Coleman*, 2 Sumner 221; *State v. Overton*, 4 Zab. 435; *Bass v. C. & N. W. Ry.*, 36 Wise. 450; *Day v. Owen*, 5 Mich. 520.

² *McDonald v. C. & N. W. R. R.*, 26 Iowa 124.

³ *P. R. R. v. Zebe*, 33 Penna. St. 326.

⁴ *P. R. R. v. Langdon*, 92 Penna. St. 21; *Creed v. P. R. R.*, 86 Id. 139.

⁵ *P. & C. R. R. v. McClurg*, 56 Penna. St. 294.

⁶ *Wills v. L. & B. R. R.*, 129 Mass. 351; *A. G. S. Ry. v. Hawk*, 72 Ala. 112, 18 Am. & Eng. R. R. Cas. 194.

⁷ *Trollinger v. E. T., V. & G. R. R.*, 11 Tenn. 533; *Beauchamp v. I. & G. N. Ry.*, 56 Tex. 239.

⁸ *Murch v. C. R. R.*, 29 N. H. 9.

⁹ *R. & M. R. R. v. Rose*, 11 Neb. 177, 1 Am. & Eng. R. R. Cas. 253; *I. & St. L. R. R. v. Kennedy*, 77 Ind. 507, 3 Am. & Eng. R. R. Cas. 467; *Arnold v. I. C. R. R.*, 83 Ill. 273; *C. & A. R. R. v. Flagg*, 43 Id. 364; *C. C. & C. R. R. v. Bartram*, 11 Ohio St. 457; *Law v. I. C. R. R.*, 32 Iowa 534.

250. It is the duty of a railway to enforce its regulations;¹ and railway servants, by permitting the passengers to disobey regulations, will make the railway liable for injuries caused to passengers by such disobedience; but the servant's dispensing power does not apply to regulations which forbid a passenger to occupy a position of danger. Thus, in *P. R. R. v. Langdon*,² where the plaintiff's decedent had been injured while riding in the baggage car, in violation of the company's rules, a reasonable view was taken as to the conductor's dispensing power, Paxson, J., distinguishing between rules which have regard to the convenience of the railway, others to the comfort of the passenger, and yet others to the safety of the passenger, and holding that a conductor cannot, in violation of a known rule of the railway, license a passenger to occupy a place of danger so as to make the railway responsible. Of course that disobedience upon the part of the passenger to the railway's regulations, which is to relieve the latter from the consequences of the negligence of its servants, must be a disobedience which is a proximate cause of his injury. Thus, in *P. R. R. v. Langdon*,³ the passenger was riding in the baggage car, and was killed by reason of being there; while in *L. & B. R. R. v. Chenewith*,⁴ the plaintiff's freight car was, in violation of the rules, attached to a passenger train, but the plaintiff was injured by reason of the negligence of the engine-driver in running over a cow upon the track. And in *Creed v. P. R. R.*,⁵ a passenger, in violation of rules, was riding in a caboose attached to a mixed freight and passenger

¹ *Britton v. A. & C. A. L. R.*, 88 N. C. 536, 18 Am. & Eng. R. R. Cas. 391.

² 92 Penna. St. 21.

⁴ 52 Id. 382.

³ 92 Penna. St. 21.

⁵ 86 Id. 139.

train, but the position of the passenger was not the cause of his injury.

VIII. STATION APPROACHES, PLATFORMS, AND BUILDINGS.

251. The railway is liable for negligence in its construction of, or failure to repair, its station approaches.¹ Thus, in *Longmore v. G. W. Ry.*,² the plaintiff's decedent, while on his way to the defendant's booking office at a station on a moonlight night, in crossing a wooden bridge over the defendant's line, fell through an aperture in the side railing and was killed, and the defendant was held liable, upon the ground that the defect was not patent, and that it was for the jury to determine whether the bridge was reasonably safe. So, in *Burgess v. G. W. Ry.*,³ the plaintiff, desiring refreshments, having alighted at a station where he was to change cars after dark, and the surroundings of the station not being lit, procured a porter with a lantern to show the way to a public house. While there he heard a train bell ring, and, hurrying back by the most direct line to the train, and mistaking the engine light for that of the station, fell into a ditch on the defendant's premises and was injured. After verdict for the plaintiff, a rule for a new trial was refused. The railway is also liable for the reasonable sufficiency of the approaches to a telegraph office at a station.⁴

¹ *Burgess v. G. W. Ry.*, 6 C. B. N. S. 923, 95 E. C. L.; *Hulbert v. N. Y. C. R. R.*, 40 N. Y. 145; *C. & I. C. R. R. v. Farrell*, 31 Ind. 408; *Bennett v. L. & N. R. R.*, 102 U. S. 577; *Hartwig v. C. & N. W. Ry.*, 49 Wisc. 378, 1 Am. & Eng. R. R. Cas. 65; *Tobin v. P. S. & P. R. R.* 59 Me. 183; *Forsyth v. B. & A. R. R.*, 103 Mass. 510; *Dillaye v. N. Y. C. R. R.*, 56 Barb. 30; *Hoffmann v. N. Y. C. & H. R. R. R.*, 75 N. Y. 605; *C. & N. R. R. v. Fillmore*, 57 Ill. 265; *Quimby v. B. & M. R. R.*, 69 Me. 340; *Longmore v. G. W. Ry.*, 19 C. B. N. S. 183, 115 E. C. L.

² 19 C. B. N. S. 183, 115 E. C. L.

³ 6 C. B. N. S. 923, 95 E. C. L.

⁴ *Clussman v. L. I. R. R.*, 73 N. Y. 606.

252. It is the duty of the railway to provide, at its stations, reasonable accommodations for waiting passengers; and the railway is, therefore, liable for negligence with regard to its station buildings,¹ urinals,² and station platforms.³ The railway is also liable for negligence in permitting snow and ice to remain on its station platforms.⁴ The railway is also liable for injuries resulting from its failure to adequately light its stations and platforms.⁵ Thus, in *Beard v. C. & P. R. R.*,⁶ the railway was held liable to a passenger injured by falling in the dark down an unlit stairway on the railway's premises from the station platform to the public highway, the stairs having been constructed by an express company, but there being nothing to notify passengers that the stairs were not intended for their use. Railways are also liable for injuries to passengers caused by obstructions upon station platforms. Thus, in *Martin v. G. N. Ry.*,⁷ the plaintiff, having arrived at the defendant's sta-

¹ See the charge of Manle, J., to the jury, as reported in *Martin v. G. N. Ry.*, 16 C. B. 179, 81 E. C. L., and also the judgment of Dillon, J., in *McDonald v. C. & N. W. Ry.*, 26 Iowa 124; and the note of Judge Redfield to the last cited case in 2 Redf. Ry. Cas. 532.

² *McKone v. M. C. R. R.*, 51 Mich. 601, 13 Am. & Eng. R. R. Cas. 29.

³ *Brassell v. N. Y. C. & H. R. R.*, 84 N. Y. 241; *Dobiecki v. Sharp*, 88 Id. 203, 8 Am. & Eng. R. R. Cas. 485; *C. & N. W. Ry. v. Seates*, 90 Ill. 586; *McDonald v. C. & N. W. Ry.*, 26 Iowa 124, 29 Id. 170; *St. L. I. M. & S. R. R. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. R. Cas. 198; *P. R. R. v. Henderson*, 51 Penna. St. 315; *L. & N. R. R. v. Wolfe*, 80 Ky. 82, 5 Am. & Eng. R. R. Cas. 625; *T. W. & W. Ry. v. Grush*, 67 Ill. 262; *Liscomb v. N. J. R. R.*, 6 Lans. 75.

⁴ *Seymour v. C. B. & Q. R. R.*, 3 Biss. 43; *Sheppard v. M. Ry.*, 20 Weekly Reporter 705; *Weston v. N. Y. E. R. R.*, 73 N. Y. 595.

⁵ *Renneker v. S. C. R. R.*, 20 Shand (S. C.) 219; *Stewart v. I. & G. N. Ry.*, 53 Tex. 289, 2 Am. & Eng. R. R. Cas. 497; *Forsyth v. B. & A. R. R.*, 103 Mass. 510; *Beard v. C. & P. R. R.*, 48 Vt. 101; *Knight v. P. S. & P. R. R.*, 56 Me. 234; *Patten v. C. & N. W. Ry.*, 32 Wisc. 524; *Patten v. C. & N. W. Ry.*, 36 Id. 413; *Peniston v. C. St. L. & N. O. R. R.*, 34 La. An. 777; *Buenemann v. St. P., M. & M. Ry.*, 32 Minn. 390, 18 Am. & Eng. R. R. Cas. 153; *Quaife v. C. & N. W. Ry.*, 48 Wisc. 513.

⁶ 48 Vt. 101.

⁷ 16 C. B. 179, 81 E. C. L.

tion within two minutes of the time of departure of his train, in running along the line in the dark, beyond the station platform, in order to reach the train, fell over a switch handle and was injured. No question of contributory negligence was raised in the cause, but the defence was rested entirely upon the ground that the plaintiff's negligence had been the exclusive cause of the accident; and the jury having found a verdict for the plaintiff a rule for a new trial was refused.¹ So in *Nicholson v. L. & Y. Ry.*,² the railway was held liable to a plaintiff who had been put down from the defendant's train at a station, and the usual place of egress being blocked by another train, in attempting to pass behind that other train, he stumbled over some hampers which had been put out of its rear carriage, and was thereby injured.

253. Railways are also liable to passengers on station platforms for injuries caused by objects negligently thrown or falling from passing trains, as, for instance, sticks of wood,³ or mail bags.⁴ In Riley's and Maine's cases, the railway was held liable because the negligent acts were done by its servant, and in Carpenter's and Snow's cases, the mail bags having been thrown out by postal agents, who were not servants of the railway, the railway was held liable because it had reason to apprehend that mail bags would be thrown from the passing train on the particular platform on which the injury was done, and it was, therefore, bound to guard passengers on its platform from the danger of being struck by

¹ *Martin v. G. N. Ry.* has been criticised by Watson, B., in *Cornman v. E. C. Ry.*, 4 H. & N. 781.

² 3 H. & C. 534.

³ *J. M. & I. R. R. v. Riley*, 34 Ind. 568; *T. W. & W. Ry. v. Maine*, 67 Ill. 298.

⁴ *Snow v. F. R. R.*, 136 Mass. 552, 18 Am. & Eng. R. R. Cas. 161; *Carpenter v. B. & A. R. R.*, 24 Hun 104, 97 N. Y. 494, 21 Am. & Eng. R. R. Cas. 331.

mail bags. The doctrine of these cases is further illustrated by *Muster v. C., M. & St. P. Ry.*,¹ and by *Walton v. N. Y. C. S. C. Co.*,² in the former of which cases the railway was held not to be liable to a servant who, while at work on a station platform, was injured by a mail bag thrown from a passing train, it being proven that the railway had no reason to apprehend that mail bags would be thrown on that particular platform; and in the latter of which cases, the railway was held not to be liable for injuries to a passenger upon a station platform, caused by the act of a porter of a private car in throwing, for his own convenience, upon the platform from a passing train, a bundle of soiled clothes, the porter not being a servant of the railway, and the railway having no reason to apprehend that such a negligent act would be done. Of course, where the article which does the injury accidentally falls from a passing train, or where the injured passenger is contributorily negligent, the railway cannot be held liable for his injuries.³ Railways are also liable to persons lawfully upon their station platforms, for injuries caused by the carelessness of the railway's servants in moving or handling luggage.⁴ Railways are liable to passengers on station platforms if they are struck by a passing train, any part of whose engine or cars projects over the platform.⁵ If there be no platform at the train's stopping-place, the railway is negligent if its servants do not assist passengers to alight, and if, for want of such assistance, a passenger in alighting be

¹ 61 Wisc. 325, 18 Am. & Eng. R. R. Cas. 113.

² 139 Mass. 556, Am. & Eng. R. R. Cas. , note.

³ O. & M. R. R. v. Gullett, 15 Ind. 487.

⁴ Tebbutt v. B. & E. Ry., L. R. 6 Q. B. 73.

⁵ Dobiecki v. Sharp, 88 N. Y. 203, 8 Am. & Eng. R. R. Cas. 485; *Langan v. St. L., I. M. & S. Ry.*, 72 Mo. 392, 3 Am. & Eng. R. R. Cas. 355; *C. & A. R. R. v. Wilson*, 63 Ill. 167.

injured without fault on his part, the railway is liable to him in damages therefor.¹

254. Where the arrangement of a station is such that a passenger has to cross a track, either before entering or after leaving the cars, he has a right to assume that that track may be crossed safely, and the railway is liable if he be struck by a train moving on that track, when he is approaching or leaving the cars or station.² As Andrews, J., said in *Brassell v. N. Y. C. & H. R. R. R.*,³ "a passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage to and from the train."

255. Of course, a railway is not to be held liable to the passengers at its stations or on its premises, for injuries which do not result from its negligence; thus, in *Cornman v. E. C. Ry.*,⁴ the plaintiff having gone in the dark to a luggage counter upon his arrival at the defendant's station, in order to get a parcel, and while standing there, a train having come in and a crowd of passengers passing out forced the plaintiff against a weighing machine, in falling over which he was injured,

¹ *M. & C. R. R. v. Whitfield*, 44 Miss. 466.

² *Rogers v. R. Ry.*, 26 L. T. N. S. 879; *Warren v. F. R. R.*, 8 Allen 227; *Gaynor v. O. C. & N. R. R.*, 100 Mass. 208; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. R.*, 84 Id. 241, 3 Am. & Eng. R. R. Cas. 380; *Green v. E. Ry.*, 11 Hun 333; *P. R. R. v. White*, 88 Penna. St. 327; *Klein v. Jewett*, 26 N. J. Eq. 474; *Armstrong v. N. Y. C. & H. R. R. R.*, 64 N. Y. 635; *B. & O. R. R. v. State, to use of Hauer*, 60 Md. 449, 12 Am. & Eng. R. R. Cas. 149; *Chaffee v. B. & L. R. R.*, 104 Mass. 108; *Wheclock v. B. & A. R. R.* 105 Id. 203; *Phillips v. R. & S. R. R.*, 57 Barb. 644; *sed. cf. I. C. R. R. r. Hudelson*, 13 Ind. 325.

³ 84 N. Y. 241, 3 Am. & Eng. R. R. Cas. 380.

⁴ 4 H. & N. 781.

after verdict for the plaintiff a rule was made absolute for a new trial, on the ground that there was no evidence of negligence on the part of the railway. So, in *Crafter v. Metropolitan Ry.*,¹ the plaintiff, a frequent traveller upon the defendant's train, in descending a staircase leading from the highway to the defendant's platform, slipped upon the casing of the stairs, which was of brass, originally rough, but smooth by constant use. Two witnesses having testified that the stairway was unsafe, because the casing should have been of lead not brass, a verdict passed for the plaintiff, but a rule for a nonsuit was made absolute for want of proof of defendant's negligence.² So, in *Toomey v. L. B. & S. C. Ry.*,³ where on a station platform there were two doors, the one having painted over it the words, "For gentlemen," and the other having painted over it the words "Lamp-room," and a passenger intending to go to the urinal, having opened the other of the two doors, fell down some steps and was injured, it was held that the railway was not liable. So, in *Potter v. W. & W. R. R.*,⁴ the railway was held not to be liable for injuries caused to a girl by her tripping over a rail on a track which she was crossing in order to board a train. So, in *Welfare v. L. & B. Ry.*,⁵ it was proven that the plaintiff went to the defendant's station as an intending passenger, and, having made some inquiries respecting the departure of the trains, and having been directed by the defendant's porter to look at a time-table suspended on the wall of the portico of the station, was, while looking at the time-table, injured by a plank and roll of zinc which broke through the roof and fell upon him, and through the

¹ L. R. 1 C. P. 300.

² See *Crocheron v. N. S. S. I. Ferry*, 56 N. Y. 656, in which the facts were similar, and the judgment also for the defendant.

³ 3 C. B. N. S. 146, 91 E. C. L.

⁴ 92 N. C. 541, 21 Am. & Eng. R. R. Cas. 328.

⁵ L. R. 4 Q. B. 693.

hole so made it was observed that a man was on the roof. Blackburn, J., nonsuited the plaintiff, and the Queen's Bench refused to take off the nonsuit, holding that the railway could not be held liable for the defective condition of the roof in the absence of proof of knowledge, or means of knowledge or obligation to know the state of the roof, and that, as regards any possible negligence on the part of the man on the roof, *non constat* that he was not a servant of an independent contractor rather than a servant of the railway. Upon the same principle it was held that a railway was not liable to a passenger for injuries caused by the bite of a dog, which had strayed upon a station platform.¹ Nor is the railway liable to a passenger who, in entering a car at rest, falls upon its steps, for that is a case of inevitable accident.²

256. It is the duty of passengers on station platforms to exercise a reasonable care for their own safety ;³ thus, it is contributory negligence in a passenger to run upon a narrow platform by the side of a moving train,⁴ or in daylight to strike his head against a plank over the platform, on which a porter is standing to clean a lamp.⁵ So, if the passenger, where a safe and convenient platform has been provided, voluntarily alights on the side opposite to the platform, and while heedlessly crossing a track is injured, the railway is not liable,⁶ nor where

¹ Smith v. G. E. Ry., L. R. 2 C. P. 54.

² C. St. L. & N. O. R. R. v. Trotter, 61 Miss. 417, 18 Am. & Eng. R. R. Cas. 159.

³ Renneker v. S. C. Ry., 20 Shand S. C. 219; Forsyth v. B. & A. R. R., 103 Mass. 510.

⁴ Rigg v. M. S. & L. Ry., 12 Jur. N. S. 525.

⁵ Watkins v. G. W. Ry., 37 L. T. N. S. 193.

⁶ P. R. R. v. Zebe, 33 Penna. St. 318, 37 Id. 420; Bancroft v. B. & W. R. R., 97 Mass. 275; McQuilkin v. C. P. R. R., 64 Cal. 463, 16 Am. & Eng. R. R. Cas. 353; Forsyth v. B. & A. R. R., 103 Mass. 510; cf. P. R. R. v. White, 88 Penna. St. 327.

the passenger having arrived at the station after dark in sufficient time to get to the platform voluntarily waits and attempts to get on the car from the side away from the station;¹ nor will negligence upon the part of the railway, in failing to give notice of the approach of a moving train, in all cases render it liable to one who fails to exercise reasonable care as to his own safety; thus, in *Carroll v. P. R. R.*,² the plaintiff, in going to the defendant's station, intending to be a passenger and attempting to pass in front of a moving train which, as he had admitted he could have seen if he had looked, was run over, and having been nonsuited at the trial judgment for the defendant was affirmed in error.³ On the other hand, in *D. W. & W. Ry. v. Slattery*,⁴ the plaintiff's decedent having gone to the defendant's station to accompany a relative who was going to take a train and having crossed the line at night in front of an approaching train, obtained the ticket for the passenger and recrossed behind that train and was killed by a fast express train upon the other track. The evidence was contradictory as to whether the express train had whistled or given other notice of its approach, and after verdict for the plaintiff, it was held, Lords Hatherly, Coleridge, and Blackburn dissenting, that the case had been properly left to the jury.

IX. BOARDING AND DESCENDING FROM TRAINS.

257. It is the duty of railways to give to passengers at its stations reasonable notice of the starting of its

¹ M. C. R. R. *v. Coleman*, 28 Mich. 440; *Harvey v. E. R. R.*, 116 Mass. 269.

² 12 Weekly Notes of Cases (Penns.), 348.

³ See also *Wheelwright v. B. & A. R. R.*, 135 Mass. 225, 16 Am. & Eng. R. R. Cas. 315; *C., B. & Q. R. R. v. Dewey*, 26 Ill. 255.

⁴ 3 Ap. Cas. 1155.

trains,¹ and to give to its passengers in its trains reasonable notice of the approach of the train to its stations, in order that the passengers who are to leave the cars may prepare to alight.² There has been some diversity of opinion as to the effect of calling out the name of a station when a train is in motion. In *Lewis v. L. C. & D. Ry.*,³ Blackburn, J., said, "Calling out the name of a station is not an invitation to alight." In *Weller v. L. B. & S. C. Ry.*,⁴ Brett, J., said, "I agree that the calling out the name of a station before the train has come to a standstill is no evidence of negligence on the part of the company;" and Honeyman, J.,⁵ expressed his opinion to the same effect. In *Whittaker v. M. & S. Ry.*,⁶ Bovill, C. J., said, it is "a question for the jury whether the calling out of the name of a station amounts, under all the circumstances, to an invitation to alight;" and Willes, J., said, "I cannot now understand how it could be said as a matter of law that the calling out of the name of a station was not an invitation." In *Bridges v. N. L. Ry.*,⁷ Pollock, B., said, "it is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform." And Brett and Denman, JJ., thought that the question was one for the jury. The subject was also somewhat considered in *P. R. R. v. Aspell*,⁸ and in *P. R. R. v. White*,⁹ but no positive view with regard to the necessary legal effect of calling out the name of the station

¹ *Perry v. C. R. R.*, 58 Ga. 461, 66 Id. 746.

² *Dawson v. L. & N. R. R.*, Ky. , 11 Am. & Eng. R. R. Cas. 134.

³ L. R. 9 Q. B. 71.

⁴ L. R. 9 C. P. 132.

⁵ Id. 134.

⁶ L. R. 5 C. P. 464, note.

⁷ L. R. 7 H. L. 224.

⁸ 23 Penna. St. 147.

⁹ 88 Id. 327.

was expressed.¹ In *Penna. Co. v. Hoagland*,² where the railway's servant on a train in motion at night announced that the next stop would be at a certain station, naming it, and the train having stopped shortly afterwards upon a siding ten miles short of the station, a female passenger, whose destination was that particular station, and who was unacquainted with the route of the railway or the location of its stations, there alighted with the assistance of a railway servant who asked her no questions, and the train then proceeded, leaving her alone, and it was held that the railway was liable. In *Edgar v. N. R. R.*,³ where the railway was held liable to a female passenger who was injured in alighting from a slowly moving train at a station, Patterson, J. A., said: "the announcement that the next station was Lefroy does not strike me as having much significance. As a statement of a fact, it contained nothing new to the plaintiff, and as a statement that it was intended that certain passengers should get off the train at that station, it contained no more information than what was contained in the contract evidenced by the tickets. But, taken in connection with the slowing of the train without stopping it, it is, as far as it goes, a bit of evidence consistent with the position taken by the plaintiff." Perhaps, the right deduction from the cases is that the

¹ See also *Lewis v. L. C. & D. Ry.*, L. R. 9 Q. B. 71; *Weller v. L. B. & S. C. Ry.*, L. R. 9 C. P. 132, 134; *Whittaker v. M. & S. Ry.*, L. R. 5 C. P. 464, note; *Bridges v. N. L. Ry.*, L. R. 7 H. L. 224; *P. R. R. v. Aspell*, 23 Penna. St. 147; *P. R. R. v. White*, 88 Id. 327; *C. R. R. v. Van Horn*, 38 N. J. L. 133; *Mitchell v. C. & G. T. Ry.*, 51 Mich. 236, 18 Am. & Eng. R. R. Cas. 176; *Taber v. D. H. & L. Ry.*, 71 N. Y. 489; *C. I. R. R. v. Farrell*, 31 Ind. 408; *Pabst v. B. & P. R. R.*, 2 McArthur 42; *Nicholls v. G. S. & W. Ry.*, 7 Ir. C. L. 40; *Thompson v. B. H. & H. Ry.*, 5 Id. 517; *Brooks v. B. & M. R. R.*, 135 Mass. 21, 16 Am. & Eng. R. R. Cas. 345; *Edgar v. N. R. R.*, 4 Ont. (Can.) 201, 16 Am. & Eng. R. R. Cas. 347; *Penna. Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. R. Cas. 436.

² 78 Ind. 203, 3 Am. & Eng. R. R. Cas. 436.

³ 11 Ont. App. 452, 22 Am. & Eng. R. R. Cas. 433.

effect which is to be attributed to such an announcement is for the jury, if circumstances show that the announcement was so made as to induce the person injured to believe that the next stop of the train would be at a station, at which he might safely leave the train.

258. It is the duty of the railway to stop its trains, for a reasonable time, at way stations in order that passengers may get on or off the cars with safety;¹ and the railway is liable when its conductor, or other servant, gives a signal to start while a passenger is obviously in the act of getting on or off its train,² but if the train has stopped a reasonable time, and the passenger has given no notice of an intention to alight, and the conductor does not see him in the act of alighting, the railway is not liable for the act of its conductor in starting the train.³

259. A passenger who is carried past the station, or who is not taken up at the station to or from which the railway had contracted to carry him, is entitled to recover compensatory damages.⁴ I have, in section 24,

¹ *Bucher v. N. Y. C. & H. R. R. R.*, 98 N. Y. 128; *Wood v. L. S. & M. S. Ry.*, 49 Mich. 370; *Brooks v. B. & M. R. R.*, 135 Mass. 21; *D. & M. R. R. v. Curtis*, 23 Wisc. 152, 27 Id. 158; *S. R. R. v. Kendrick*, 40 Miss. 374; *Imhoff v. C. & M. R. R.*, 20 Wisc. 344; *N. O. R. R. v. Statham*, 42 Miss. 607; *Millmann v. N. Y. C. & H. R. R.*, 66 N. Y. 642; *P. R. R. v. Kilgore*, 32 Penna. St. 292; *J., M. & I. R. R. v. Parmalee*, 51 Ind. 42; *Keller v. S. C. & St. P. R. R.*, 27 Minn. 178; *Swigert v. H. & St. J. Ry.*, 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; *W. St. L. & P. Ry. v. Rector*, 104 Ill. 296, 9 Am. & Eng. R. R. Cas. 264; *Penna. Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. R. Cas. 436; *T. W. & W. Ry. v. Baddeley*, 54 Ill. 19; *Fuller v. N. R. R.*, 21 Conn. 557; *Davis v. C. & N. W. Ry.*, 18 Wisc. 175.

² *Swigert v. H. & St. J. R. R.*, 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; *Bucher v. N. Y. C. & H. R. R. R.*, 98 N. Y. 128; *Keating v. N. Y. C. & H. R. R. R.*, 49 Id. 673; *Mitchell v. W. & A. R. R.*, 30 Ga. 22; *C. W. D. Ry. v. Mills*, 105 Ill. 63, 11 Am. & Eng. R. R. Cas. 128.

³ *Straus v. K. C. St. J. & C. B. Ry.*, 75 Mo. 185, 6 Am. & Eng. R. R. Cas. 334; *H. & St. J. R. R. v. Cloworthy*, 80 Mo. 220, 21 Am. & Eng. R. R. Cas. 371.

⁴ *Hobbs v. L. & S. W. Ry.*, 10 Q. B. 111; *C. St. L. & N. O. R. R. v. Scarr*, 59 Miss. 456, 6 Am. & Eng. R. R. Cas. 341; *Trigg v. St. L., K. C. & N. R. R.*, 74 Mo. 147, 6 Am. & Eng. R. R. Cas. 345; *I. & G. N. R. R. v. Terry*, 62 Tex. 380, 21 Am. & Eng. R. R. Cas. 323.

given my reasons for the opinion, that when a passenger, not having been set down or taken up at the station to or from which the railway has contracted to carry him, is injured in the attempt to board or leave a moving train the railway is not liable to him, for his injuries are the consequence, not of the railway's breach of contract, but of his own rash act. There are, however, many authorities for the proposition that in such a case the railway is liable, if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man.¹ It is, nevertheless, generally held that when the train is moving at so high a rate of speed, or where the place of the passengers' ascent or descent is so obviously perilous, that a person of ordinary prudence would not attempt to get on or off the train then and there, the act of the person injured in so doing is such contributory negligence as will bar his recovery.² It is, *a fortiori*, contributory negligence

¹ *Bucher v. N. Y. C. & H. R. R.*, 98 N. Y. 128; *Swigert v. H. & St. J. R. R.*, 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; *C. R. R. v. Perry*, 58 Ga. 461, 66 Id. 746; *Johnson v. W. C. & P. R. R.*, 70 Penna. St. 357; *P. R. R. v. Kilgore*, 32 Id. 292; *C. V. R. R. v. Maugans*, 61 Md. 53, 18 Am. & Eng. R. R. Cas. 182; *Edgar v. N. Ry.*, 4 Ont. (Can.) 201; *Doss v. M., K. & T. R. R.*, 59 Mo. 37; *Loyd v. H. & St. J. R. R.*, 53 Id. 509; *Curtis v. D. & M. R. R.*, 27 Wisc. 158; *D. & M. R. R. v. Curtis*, 23 Id. 152; *Filer v. N. Y. C. & R. R.*, 49 N. Y. 47; *Delamatyr v. M. & P. M. C. R. R.*, 24 Wisc. 578; *Davis v. C. & N. W. Ry.*, 18 Id. 175; *Price v. St. L., K. C. & N. R. R.*, 72 Mo. 414, 3 Am. & Eng. R. R. Cas. 365; *St. L., I. M. & S. R. R. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. R. Cas. 198; *C. & A. R. R. v. Bonifield*, 104 Ill. 223, 8 Am. & Eng. R. R. Cas. 443; *Lambeth v. N. C. R. R.*, 66 N. C. 494; *U. P. R. R. v. Diehl*, 33 Kans. 422, 21 Am. & Eng. R. R. Cas. 350; *Boss v. P. & W. R. R. R. I.*, 21 Am. & Eng. R. R. Cas. 364; *H. & St. J. R. R. v. Clotworthy*, 80 Mo. 220, 21 Am. & Eng. R. R. Cas. 371; *M. & L. R. R. R. v. Stringfellow*, 44 Ark. 32, 21 Am. & Eng. R. R. Cas. 374.

² *McCorkle v. C. R. I. & P. Ry.*, 61 Iowa 555; *Phillips v. R. & S. R. R.*, 49 N. Y. 177; *Harper v. E. Ry.*, 32 N. J. L. 88; *D. S. P. & P. R. R. v. Pickard*, 8 Colo. 163; *M. C. Ry. v. Coleman*, 28 Mich. 440; *Harvey v. E. R. R.*, 116 Mass. 269; *P. R. R. v. Aspell*, 23 Penna. St. 147; *G., H. & S. A. R. R. v. Le Gierse*, 51 Tex. 189; *Lindsey v. C. R. I. & P. R. R.*, 64 Iowa 407, 18 Am. & Eng. R. R. Cas. 179; *L. S. & M. S. Ry. v. Bangs*, 47 Mich. 470; *C. R. R. v. Letcher*, 69 Ala. 106, 12 Am. & Eng. R. R. Cas. 115; *Burrows v. E. Ry.*, 63

in a passenger to attempt to board a train passing a way station when the train has not been flagged, and the servants in charge of the train have no reason to expect that a passenger will attempt to get on the train then and there.¹

260. Statutory regulations requiring certain signals to be given upon the approach of an engine or car to a railway station or highway crossing are primarily intended for the protection of persons approaching the line, and not of persons who are in or upon the cars;² nor will the railway's neglect to give due notice, or even the particular notice prescribed by statutory authority, of the starting of a train from a way station render it liable to a passenger who voluntarily and without notice to the railway's servants jumps from the train after it has gotten under way;³ nor will the railway's neglect to give the statutory notice required before putting in

N. Y. 556; *J. R. R. v. Hendricks*, 26 Ind. 228; *Gavett v. M. & L. R. R.*, 16 Gray 501; *Hickey v. B. & L. R. R.*, 14 Allen 429; *Davis v. C. & N. Ry.*, 18 Wisc. 175; *Nelson v. A. & P. R. R.*, 68 Mo. 595; *Kelly v. H. & St. J. R. R.*, 70 Id. 604; *Strauss v. K. C., St. J. & C. B. Ry.*, 75 Id. 185, 6 Am. & Eng. R. R. Cas. 384; *H. & T. C. Ry. v. Leslie*, 57 Tex. 83, 9 Am. & Eng. R. R. Cas. 384; *S. W. R. R. v. Singleton*, 67 Ga. 306; *Jewell v. C., St. P. & M. Ry.*, 54 Wisc. 610, 6 Am. & Eng. R. R. Cas. 379; *I. C. R. R. v. Chambers*, 71 Ill. 519; *I. C. R. R. v. Lutz*, 84 Id. 598; *Dougherty v. C., B. & Q. R. R.*, 86 Id. 467; *R. & D. R. R. v. Morris*, 31 Gratt. 200; *Gonzales v. N. Y. & H. R. R. R.*, 50 How. Pr. 126; *Secor v. T. P. & W. R. R.*, 10 Fed. Rep. 15; *Blodgett v. Bartlett*, 50 Ga. 353; *Haldan v. G. W. Ry.*, 30 Up. Can. (C. P.) 89; *Knight v. P. R. R.*, 23 Ia. An. 462; *Hubener v. N. O. & C. R. R.*, Id. 492; *Mitchell v. C. & G. T. Rv.*, 31 Mich. 266, 18 Am. & Eng. R. R. Cas. 176; *McCorkle v. C. R. I. & P. Ry.*, 61 Iowa 555, 18 Am. & Eng. R. R. Cas. 156; *W. St. L. & P. Ry. v. Rector*, 104 Ill. 296, 9 Am. & Eng. R. R. Cas. 264; *R. & D. R. R. v. Morris*, 31 Gratt. 200; *Damont v. N. O. & C. R. R.*, 9 La. An. 441; *I. C. R. R. v. Able*, 59 Ill. 131; *J. R. R. v. Swift*, 26 Ind. 459; *E. & C. R. R. v. Dunean*, 28 Ind. 441; *I. C. R. R. v. Slatton*, 54 Ill. 133; *O. & M. R. R. v. Schiebe*, 44 Ill. 460; *H. & T. C. R. R. v. Schmidt*, 61 Tex. 282, 21 Am. & Eng. R. R. Cas. 345; *Adams v. L. & N. R. R., Ky.*, 21 Am. & Eng. R. R. Cas. 380; *S. & N. A. R. R. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. R. Cas. 465.

¹ *D. S. P. & P. Ry. v. Pickard*, 8 Colo. 163, 18 Am. & Eng. R. R. Cas. 284.

² *A. G. S. Ry. v. Hawk*, 72 Ala. 112, 18 Am. & Eng. R. R. Cas. 194.

³ *C. R. R. & B. Co. v. Letcher*, 69 Ala. 106, 12 Am. & Eng. R. R. Cas. 115.

motion a freight train standing on the line render it liable to a passenger who, having left his train, attempts to pass under the coupling which connects two of the cars of the freight train.¹

261. While it is the duty of a railway company to provide reasonably safe and convenient means of ingress and egress from its cars and carriages, the railway is only to be held liable for accidents happening to its passengers in descending from a car when at rest at a station, if the circumstances are such as to induce the passenger to believe that he has reached his point of destination, and that it is safe for him to get out.² In contrasting the American and English decisions, the difference in the mode of construction between railway carriages commonly used in England and American passenger cars must be borne in mind. Thus, in *Foy v. L. B. & S. C. R. R.*,³ by reason of the occupation of the platform by another train, the carriage in which the plaintiff was a passenger on reaching its terminus in the daytime did not come up to the platform. The door of the carriage being some three feet above the ground, the defendant's porter requested the plaintiff, a female passenger, to alight. There were two steps, one on a level with the door, and the other one eighteen

¹ *M. & C. R. R. v. Copeland*, 61 Ala. 376.

² *Foy v. L. B. & S. C. Ry.*, 18 C. B. N. S. 225, 114 E. C. L.; *Praeger v. B. & E. Ry.*, 24 L. T. N. S. 105; *Cockle v. L. & S. E. Ry.*, L. R. 5 C. P. 457, 7 Id. 321; *Weller v. L. B. & S. C. Ry.*, L. R. 9 C. P. 126; *Bridges v. N. L. Ry.*, L. R. 7 H. L. 213; *Robson v. N. E. Ry.*, L. R. 10 Q. B. D. 371; *Rose v. N. E. Ry.*, 2 Ex. D. 248; *Foulkes v. M. D. Ry.*, 4 C. P. D. 267, 5 Id. 157; *P. R. R. v. White*, 88 Penna. St. 327; *T. H. & I. Ry. v. Buek*, 96 Ind. 346, 18 Am. & Eng. R. R. Cas. 234; *Cartwright v. C. & G. T. Ry.*, 52 Mich. 606, 16 Am. & Eng. R. R. Cas. 321; *C. & I. C. R. R. v. Farrell*, 31 Ind. 408; *Gaynor v. O. C. & N. Ry.*, 100 Mass. 208; *Brooks v. B. & M. R. R.*, 135 Mass. 21, 16 Am. & Eng. R. R. Cas. 345; *Edgar v. N. R. R.*, 4 Ont. 201, 16 Am. & Eng. R. R. Cas. 347; *C. R. R. v. Van Horn*, 38 N. J. Law 133; *Edgar v. N. R. R.*, 11 Ont. App. 452, 22 Am. & Eng. R. R. Cas. 433.

³ 18 C. B. N. S. 225, 114 E. C. L.

inches below that. The plaintiff got on the first step, and taking the hand of a gentleman jumped to the ground, and being in delicate health the concussion injured her spine. Erle, C. J., left it to the jury to say whether the accident was due to the plaintiff's carelessness, or to the defendant's negligence in not providing a convenient means of descent. There was a verdict for the plaintiff, and the court refused a new trial. In *Praeger v. B. & E. Ry.*,¹ the train had after dark drawn up at a dimly lighted station, the platform not being parallel to the rails, but by reason of its being beveled off to make room for a siding, being some two feet away from the carriage in which the plaintiff, a male passenger, was riding. A guard opened the door, and said nothing, and the plaintiff, believing that he was stepping upon the platform, stepped out and fell between the carriage and the platform. Judgment on a verdict for the plaintiff was affirmed in the Exchequer Chamber on the ground that there was evidence of negligence on the part of the defendant in that the station was dimly lighted, the platform was defectively constructed, and the defendant's servant omitted to warn the passenger not to alight. In *Cockle v. L. & S. E. Ry.*,² the facts were identical with those in Praeger's case, excepting that no guard had opened the carriage door, and it was held in the Exchequer Chamber that "the leaving a carriage which had been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may, therefore, do so with safety, without any warning of his danger, amounts to negligence on the part of the company." In *Weller v. L. B. & S. C. R. R.*,³ the train after dark

¹ 24 L. T. N. S. 105.

² L. R. 5 C. P. 457, 7 Id. 321.

³ L. R. 9 C. P. 126.

was approaching a station, the lamps of which were not lit, when the porter having called out the name, the train overshot the platform and came to a final stop. The plaintiff, a male passenger, and a commuter, hearing the doors open and shut and seeing persons getting out of the next carriage, stepped out and was hurt. At the trial he was nonsuited, but a rule to take off the nonsuit was made absolute, upon the ground that the defendant was negligent in stopping its train at a point where the lights were not lit, and in not warning the passenger not to alight. In *Bridges v. N. L. Ry.*,¹ Highbury Station was at the mouth of a tunnel, the platform extending into the tunnel. The train arrived after dark, the carriage in which the plaintiff, a commuter, was riding having stopped in the tunnel, but not at the platform, and the name of the station having been called by the guard. The plaintiff's decedent fell in getting out of the carriage, and died from the injuries thereby caused. It was held sufficient evidence of defendant's negligence for the jury. In *Robson v. N. E. Ry.*,² the facts were identical with those in Lewis' case, and it was held by the Queen's Bench and by the Court of Appeal that the defendant was negligent in not stopping the carriage at the platform, and that the plaintiff had a right to suppose that if she did not get out the train would proceed, and that the defendant was also negligent in not providing some safe means for women to alight. In *Rose v. N. E. Ry.*,³ the train had stopped at a station; the carriage in which the plaintiff, a female passenger, was riding being beyond the platform. The porter called to the passengers to keep their seats. The plaintiff waited some time, but the train not having backed, she got out, and in so doing

¹ L. R. 6 Q. B. 377, 7 H. L. 213.

² L. R. 10 Q. B. 271.

³ 2 Ex. D. 248.

was injured. The jury found for the plaintiff, and leave was given to the defendant to move to enter a nonsuit. The court below entered the nonsuit, but the Court of Appeal reversed and entered judgment for the plaintiff, holding that the company was negligent in not backing its train, or in not providing servants to assist the passengers in getting out. In *Foulkes v. M. D. Ry.*,¹ the door of the carriage in which the plaintiff travelled was about two feet three inches above the platform of the station at which the plaintiff was to alight. Although it was after dark, and the carriage had neither platform nor steps, no warning was given to the plaintiff as to the depth of descent from the carriage to the platform, and in getting out he fell and was injured. It was held that there was evidence of negligence on the part of the defendant. In *P. R. R. v. White*,² the defendant's train on approaching Penn Valley Station slowed up and stopped opposite a house marked "Penn Valley Station," the brakeman having announced before the train came to a stop, "the next station is Penn Valley." The plaintiff's decedent stepped off the car after it had come to a stop on the side towards the platform, but separated from the platform by another track, and was struck by a passing express train and killed. The train had stopped under the company's rules that local trains should give way to express trains at stations, the regular station being on the right side of the train and some distance from where the train had stopped. The court below entered judgment on the verdict for the plaintiff, and the Supreme Court affirmed it on the ground that it was for the jury to say whether, under the circumstances, the plaintiff had a right to suppose that the train had

¹ L. R. 4 C. P. D. 267, 5 Id. 157.

² 88 Penna. St. 327.

come to a final stop at his point of destination. In *C. & I. C. R. R. v. Farrell*,¹ the railway was held liable to a passenger who was injured in alighting from the cars at night, the train having come to a stop on a bridge over a culvert, and a railway servant having called out the name of the station.

262. On the other hand, where a passenger, in the exercise of reasonable care, can see that by getting out then and there in his own way, he is encountering a peril, the railway is not liable.² Thus, in *Siner v. G. W. Ry.*,³ the facts were similar to those in Foy's case, excepting that no servant of the defendant requested the plaintiff to alight. At the trial the plaintiff was nonsuited, and the Exchequer Chamber affirmed the refusal of the court below to take it off, upon the ground that there was no evidence of negligence upon the part of the defendant, the accident having been solely caused by the plaintiff's own negligence in disregarding her duty to use the conveniences provided by the company, Hannen, J., saying: "other people got down without injury. It is true the female plaintiff said she could not. But she does not say why she could not. Suppose she had said so of an ordinary platform. The bare assertion would not be enough; and applying the common knowledge we all have as to the construction of carriages, I think it lay upon the plaintiff to show more special reason why it was dangerous or impossible to use the footboard, so as to make it negligence on the part of the company not to provide some other means of alighting;" and Mellor, J., added, "the evidence

¹ 31 Ind. 408.

² *Siner v. G. W. Ry.*, L. R. 3 Ex. 150, 4 Id. 117; *Lewis v. L. C. & D. Ry.*, L. R. 9 Q. B. 66; *D., L. & W. R. R. v. Napheys*, 90 Penna. St. 135; *P. R. R. v. Zebe*, 33 Id. 318, 37 Id. 420; *E. & C. R. R. v. Duncan*, 28 Ind. 441; *Mitchell v. C. & G. T. Ry.*, 51 Mich. 236; *Frost v. G. T. Ry.*, 10 Allen 387.

³ L. R. 3 Ex. 150, 4 Id. 117.

seems to me to establish, not negligence, but only a less degree of convenience than is usual, and for that the defendants are not responsible." In *Lewis v. L. C. & D. Ry.*,¹ a female passenger for Bromley, while the train was passing after dark through the station, which she knew well, heard the name of the station called by the guard; the train then stopped, with the carriage in which the plaintiff was riding, at a point beyond the platform. The plaintiff attempted to get out, and at that moment the train started to back to the platform, and the plaintiff fell and was injured. The plaintiff was nonsuited. In *D., L. & W. R. R. v. Napheys*,² the facts were identical with those in Foy's and Siner's cases, and it was held that there was no evidence of negligence upon the part of the defendant, Sterrett, J., saying, in his judgment: "the cars were at rest on the track; there was no jar or breaking of machinery. Mrs. Napheys, with the assistance of her husband, was descending the steps from the platform of the car. They had every opportunity of seeing and knowing where she was going, and controlling her movements. If the lower step were inconveniently or dangerously high for her in the condition she was, she and her husband has as good an opportunity as any one else of knowing the fact. If they had even a suspicion that it was in the least degree unsafe for her to take the last step, there was no urgent necessity for her to do so. The train had reached its destination, and there was no occasion for haste in leaving the car. If they had any apprehension of danger, or even of inconvenience in descending from the lower step, there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of egress if they

¹ L. R. 9 Q. B. 70.

² 90 Penna. St. 135.

deemed it necessary." In *P. R. R. v. Zebe*,¹ the plaintiff sued to recover damages for the death of his son. The plaintiff and his son were passengers on a train which stopped at its destination at the station platform. At that point the defendant's line had two tracks, and the plaintiff and his son, instead of getting out upon the platform side of the train, got out upon the other side, and the son was killed by a train passing upon the other track. The case was twice tried, and came twice before the Supreme Court, the jury finding for the plaintiff upon each occasion, the court below entering judgment on the verdict, and the Supreme Court reversing. In the first report the judgment was reversed, because the court below left the case to the jury without proof of any necessity justifying the plaintiff and his son in descending from the car upon the side away from the platform. In the second report, the judgment was reversed because the court below admitted the evidence of two witnesses that they were in the habit, at that station, of getting out from that side which was away from the platform. And in each report, it was held that the duties of the carrier and the passengers are reciprocal, the carrier being bound to provide a "safe and convenient means of egress and regress to and from the line of their road," and the duty of the passenger being to comply with "all the company's reasonable rules and regulations for entering, occupying and leaving the cars." Nor is the railway, when its train is stopped at night before coming up to a station, liable to one who, having boarded the train to look for his wife and child, whom he expected to find as passengers on the train, carelessly steps off a car platform into a culvert, which he did not see in the darkness.²

¹ 33 Penna. St. 318, 37 Id. 420.

² *Stiles v. A. & W. P. R. R.*, 65 Ga. 370, 8 Am. & Eng. R. R. Cas. 195.

263. It is not possible to reconcile all the cases, and some two or three of the English cases might have been differently decided if the judges who decided them had not misapprehended the force and effect of the decision of the House of Lords in Bridge's case as to the respective provinces of the court and the jury. But there is one broad ground of distinction running through the cases which serves to reconcile most of them, and that is, that while it is the duty of a railway to provide reasonably safe and convenient means of ingress and egress from its cars and carriages, the railway is only to be held liable for accidents happening to passengers in descending from its cars at rest when the circumstances are such as to induce a passenger to believe that he has reached his point of destination, and that it is safe for him to get out. In this category are the cases of Praeger, Cockle, Weller, Bridges, Robson, Rose, Foulke, White, and similar cases. On the other hand, the company is not to be held liable where the passenger, in the exercise of reasonable care, can see that by getting out then and there in his own way he is encountering peril. This is the result of the cases of Siner, Lewis, Napheys, Zebe, and similar cases.

264. It is not necessarily contributory negligence in a passenger to attempt to enter or leave a car at rest when it is not in position at the platform;¹ and especially is this the case when the railway has usually permitted passengers to so enter its cars.²

265. It is the duty of a railway operating street cars to allow to passengers a reasonable opportunity to alight

¹ *Stoner v. Penna. Co.*, 98 Ind. 384, 21 Am. & Eng. R. R. Cas. 340; *Keating v. N. Y. C. & H. R. R. R.*, 49 N. Y. 673; *Phillips v. R. & S. R. R.*, 57 Barbour 644.

² *McDonald v. C. & N. W. Ry.*, 26 Iowa 124.

from the cars;¹ and the passenger on a street car should give to the servant in charge of the car a reasonable notice of his intention to alight;² but when the car has come to a stop, a passenger is justified in attempting to alight, and it is immaterial that he did not request the conductor to make the stop for him, or notify the conductor that he intended to get off then and there.³

X. THE DUTY OF THE RAILWAY TO ITS PASSENGERS IN THE OPERATION OF ITS LINE.

266. That duty of care for their safety which the railway owes to its passengers requires it to use in the operation of its line every precaution which the experience of well-managed railways has shown to be essential to the transportation of passengers in safety. The railway is, therefore, liable whenever a passenger is injured, without fault on his part, by its negligent conduct of its business; as, for instance, by a collision between trains on the line,⁴ or by a collision between a train and cars on a siding;⁵ or between two street cars;⁶ or by a derailment of the train carrying the passenger;⁷

¹ C. C. Ry. v. Mumford, 97 Ill. 560; Wardle v. N. O. C. R. R., 35 La. An. 202, 13 Am. & Eng. R. R. Cas. 60; Knowlton v. M. C. R. R., 59 Wisc. 278, 16 Am. & Eng. R. R. Cas. 330; Ward v. C. C. R. R., 19 Shand (S. C.) 521, 16 Am. & Eng. R. R. Cas. 356.

² Mulhado v. B. C. R. R., 30 N. Y. 370; Oram v. M. R. R., 112 Mass. 38; Nichols v. M. R. R., 106 Id. 463.

³ C. W. D. Ry. v. Mills, 105 Ill. 63, 11 Am. & Eng. R. R. Cas. 128; Rathbone v. U. R. R., 13 R. I. 709, 13 Am. & Eng. R. R. Cas. 58.

⁴ Skinner v. L. B. & S. C. Ry., 5 Ex. 787; I. R. R. v. Mowery, 36 Ohio St. 418, 3 Am. & Eng. R. R. Cas. 361; N. O., J. & G. N. R. R. v. Albertson, 38 Miss. 242.

⁵ N. Y., L. E. & W. R. R. v. Seybolt, 95 N. Y. 562, 18 Am. & Eng. R. R. Cas. 162; Farlow v. Kelly, 108 U. S. 288.

⁶ Smith v. St. P. C. Ry., 32 Minn. 1, 16 Am. & Eng. R. R. Cas. 310.

⁷ Carpue v. L. & B. Ry., 5 Q. B. 747, 48 E. C. L.; Dawson v. M. Ry., 7 H. & N. 1037; Sullivan v. P. & R. R. R., 30 Penna. St. 234; N. Y., L. E. & W. R. R. v. Daugherty, 11 Weekly Notes of Cases (Penna.) 437; Edgerton v. N. Y. C.

or by an explosion of the boiler of a locomotive;¹ or by a negligent coupling of another car to that in which the passenger is carried, so that the passenger is injured by the jar;² or by the knocking of a gate bar at a crossing against a train by a runaway team;³ or by a jet of water thrown from a water tank upon a passenger;⁴ or by a jet of steam thrown on a passenger in leaving a steamboat which the railway operates as a part of its line;⁵ or by a collision with a coal bin in too close proximity to the line.⁶ So also the railway is liable when its servants, being aware that a bridge, which constitutes part of the line, has been carried away by a flood, do not take the proper means to stop an approaching train;⁷ or where repairs to a line are so negligently conducted that a collision ensues between a passenger train and a construction train.⁸ So the railway is liable for injuries to a passenger in entering a street car, caused by its negligence in banking up on the sides of its line snow which it had removed therefrom.⁹ So, also, the railway is liable for negligently

& H. R. R. R., 39 N. Y. 227; *Festal v. M. R. R.*, 109 Mass. 720; *George v. St. L., I. M. & S. R. R.*, 34 Ark. 613, 1 Am. & Eng. R. R. Cas. 294; *P., C. & St. L. Ry. v. Williams*, 74 Ind. 462; *C., C., C. & I. Ry. v. Newell*, 75 Id. 542; *Curtis v. R. & S. R. R.*, 18 N. Y. 534; *Tuttle v. C., R. I. & P. Ry.*, 48 Iowa 236; *Brignoli v. C. & G. E. R. R.*, 4 Daly (N. Y.) 182; *C., B. & Q. R. R. v. George*, 19 Ill. 510; *L. R. & F. S. Ry. v. Mills*, 40 Ark. 298, 13 Am. & Eng. R. R. Cas. 10; *Yonge v. Kenney*, 28 Ga. 111; *T. & St. L. R. R. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. R. Cas. 475; *K. C. R. R. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. R. Cas. 79; *Brown v. N. Y. C. R. R.*, 34 N. Y. 404; *C., R. I. & P. Ry. v. McAra*, 52 Ill. 296; *N. & C. R. R. v. Messino*, 1 Sneed (Tenn.) 220.

¹ *Robinson v. N. Y. C. & H. R. R. R.*, 20 Blatchf. 338.

² *White v. F. R. R.*, 136 Mass. 321. ³ *Tyrrel v. E. R. R.*, 111 Mass. 546.

⁴ *T. H. & I. R. R. v. Jackson*, 81 Ind. 19, 6 Am. & Eng. R. R. Cas. 178.

⁵ *Gruber v. W. & J. R. R.*, 92 N. C. 1, 21 Am. & Eng. R. R. Cas. 438.

⁶ *Dickinson v. P., H. & N. W. R. R.*, 53 Mich. 43, 21 Am. & Eng. R. R. Cas. 456.

⁷ *Lambkin v. S. E. Ry.*, 5 App. Cas. 352.

⁸ *Matteson v. N. Y. C. R. R.*, 35 N. Y. 487.

⁹ *Dixon v. B., C. & N. R. R.*, 100 N. Y. 171.

bringing a train to a stop at the crossing of another line in such a position that a passenger in or on its car is injured by a collision with cars negligently moved on that other line.¹ So the railway is liable for injuries caused by the absence of a bell rope by which the train might have been stopped;² or by which the passenger might have communicated with the guard;³ and the railway is liable for injuries caused by the fall of a negligently constructed berth in a sleeping-car.⁴ Illustrations might be multiplied indefinitely, but it is not necessary, for the result of the authorities is simply this, that the railway is liable for the injury incurred by the passenger in the operation of the line, whenever it is shown that that injury was caused either by the railway's omission of some precaution which it was bound to take for his protection, or by the commission of a negligent act by some one for whose acts the railway is legally responsible.

267. No rate of speed, however high, can be said to be necessarily negligence as to passengers in the train;⁵ but, of course, nothing will justify a high rate of speed under conditions of danger.⁶ Thus, where the line is out of repair, it is negligence to run trains at a high rate of speed.⁷ So, in *White v. M. C. Ry.*,⁸ it was held to be negligence with regard to a passenger in a street railway, to run its car at a high rate of speed over rails

¹ *Kellow v. C. I. R. R.*, Iowa, 21 Am. & Eng. R. R. Cas. 485. See also *P. P. Ry. v. Weiller*, 17 Weekly Notes of Cases (Penna.) 306.

² *M. R. R. v. Ashcraft*, 48 Ala. 16, 49 Id. 305.

³ *Blamires v. L. & Y. Ry.*, L. R. 8 Ex. 283.

⁴ *Penna. Co. v. Roy*, 102 U. S. 451; *C., C., C. & I. R. R. v. Walrath*, 38 Ohio St. 461, 8 Am. & Eng. R. R. Cas. 371.

⁵ *G. R. & I. R. R. v. Huntley*, 38 Mich. 537.

⁶ *C., C., C. & I. R. R. v. Newell*, 75 Ind. 542, 3 Am. & Eng. R. R. Cas. 483.

⁷ *P. P. & J. R. R. v. Reynolds*, 88 Ill. 418; *O. & M. Ry. v. Selby*, 47 Ind. 471; *M. P. Ry. v. Collier*, 62 Tex. 318, 18 Am. & Eng. R. R. Cas. 281.

⁸ 61 Wisc. 536, 18 Am. & Eng. R. R. Cas. 213.

unguarded by frogs, at the entrance to a swinging bridge. So, in *Ellett v. St. L., K. C. & N. Ry.*,¹ the railway was held to be negligent as regards a passenger who was injured by a derailment of the train consequent upon a sinking of the track in a flood, the engine-driver having run the train at a high rate of speed under conditions of danger; so in *I., B. & W. R. R. v. Hall*,² a jury were permitted to find the railway negligent as to a passenger in a train which was derailed by striking a cow on a straight line of track on a prairie, because the train was running, soon after daybreak of a foggy morning, upon its schedule time, fifty miles an hour, the judge, at the trial, having left to the jury the question whether or not, under the circumstances, the rate of speed was negligent. The test of the proximate or remoteness of the speed as a cause of injury in any case of collision or derailment is to be found in the answer to the question, was or was not that speed prudent under the circumstances, as those circumstances either were, or ought to have been known, to the servant who directed the movement of the train?

268. The railway is also liable to its passengers for injuries caused by the negligent closing of a door of a car by a servant of the railway. Thus in *Fordham v. B. & S. C. Ry.*,³ the plaintiff, while entering the defendant's carriage after dark, holding a parcel in his right hand, placed his left hand upon the open door of the carriage, and a guard from without closed the door, and in so doing injured the plaintiff's left hand; and it was held that the plaintiff was entitled to recover.⁴ So, in *G. H. & S. A. R. R. v. Davidson*,⁵ where the plain-

¹ 76 Mo. 518.

² 106 Ill. 371, 12 Am. & Eng. R. R. Cas. 146.

³ L. R. 3 C. P. 368, 4 Id. 619.

⁴ See also *Coleman v. S. E. Ry.*, 4 Ill. & C. 699.

⁵ 61 Tex. 204, 21 Am. & Eng. R. R. Cas. 431.

tiff sued for injuries received in an ordinary American saloon car, by the act of a railway servant in closing the door upon the plaintiff's hand, it was held that it was for the jury to determine whether or not the act of the servant was negligent, regard being had to the plaintiff's position at the time of the injury, and the knowledge which the servant had of the possibility of injury to the plaintiff by reason of the closing of the door. On the other hand, in *Richardson v. Metropolitan Ry.*,¹ a plaintiff, having entered a carriage, permitted his hand to remain upon the door for some half a minute, and the defendant's porter, having first called, "Take your seats," closed the door, and injured the plaintiff's hand; and it was held that the defendant was not liable, the porter having closed the door in the ordinary exercise of his duty after due warning, and the sole cause of the injury being the plaintiff's negligence in permitting his hand to remain on the door after he had entered the carriage. So, in *Jackson v. M. Ry.*,² it was held, in the House of Lords, affirming the Court of Appeal and reversing the Common Pleas, that, where the plaintiff had been injured by reason of having risen in an overcrowded carriage to prevent the entry of more passengers, the door being hastily closed by the defendant's servant upon the plaintiff's hand, the railway was not liable. In Richardson's and in Jackson's cases, the injury was done by an act of a servant in the course of his duty, and not negligently performed, and injury resulted to the passenger only because he himself was negligent; while in Fordham's case the servant closed the door upon a passenger in the act of entering the car; and in Davidson's case there was evidence from which the jury might properly, and did, in fact,

¹ L. R. 3 C. P. 374.

² L. R. 10 C. P. 49, 2 C. P. D. 125, 3 App. Cas. 193.

find that the servant ought to have seen the position in which the plaintiff was standing. The distinction, therefore, is that the passenger is entitled to recover for such injuries when they result from carelessness on the part of the railway's servant, the passenger not contributing to the accident by any imprudent act on his part.

269. A passenger has the right to assume that the doors of the car are reasonably secure, thus, in *Gee v. M. Ry.*,¹ the plaintiff, having risen from his seat in the carriage for the purpose of looking at the signal lights upon the line, put his hand on the bar across the window; the door flew open, and the plaintiff fell out and was injured, and it was held that he was entitled to recover, for he might reasonably suppose that the door had been properly shut by the defendant's servants, and that he could with safety lean upon it. So, in *W. M. R. R. v. Stanley*,² a passenger was held entitled to recover for injuries received in attempting to close the door of his car while passing through a tunnel, the railway having omitted to light the car, and the open door inconveniencing the plaintiff and the other passengers in the car by its admission of smoke and cinders. On the other hand, in *Adams v. L. & Y. Ry.*,³ the door of the carriage in which the plaintiff was riding would not remain shut while the train was in motion, but there was room enough for the plaintiff to sit away from the door, and the weather was good. The plaintiff, having shut the door three times, attempted, for the fourth time, to close it within three minutes of the time of arrival of the train at a station, and, in so doing, he fell out and was injured. Judgment was entered for the defendant upon the ground

¹ L. R. 8 Q. B. 161.

² 61 Md. 266, 18 Am. & Eng. R. R. Cas. 206.

³ L. R. 4 C. P. 739.

that, as the inconvenience to the plaintiff from the open door was slight, and the peril in attempting to close it was considerable, the injury resulting from that attempt was caused solely by his own carelessness; but in the later case of *Gee v. M. Ry.*,¹ *Adams v. L. & Y. Ry.*, is commented upon, and the application to the facts of that case of the doctrine as above stated questioned.

270. It is both the right and the duty of the railway to remove from its cars disorderly passengers whose misconduct endangers the safety of their fellow-passengers;² but the duty of the railway to its passengers does not require it to maintain a police force, either at its stations or on its cars, for the suppression of riots, or the prevention of any possible breach of the peace; thus, in *P., N., N. C. R. R. v. Hinds*,³ the plaintiff, a female, having been injured in the course of a fight between a number of drunken men, who, at a station, had forced themselves into the defendant's car and usurped the control thereof, it was held that the defendant was not liable, for its duty was to provide servants enough for the ordinary conduct of its transportation business, but not to provide police, and the conductor, not having voluntarily admitted the creators of the disturbance, but having been overpowered by them, the defendant was not to be held liable. On the same principle it was held in *Cannon v. M., G. W. Ry.*,⁴ that a railway is not liable for injuries caused by the disorderly conduct of a mob who had taken possession of a station platform. So also, in *Putnam v. B. & S. A. R. R.*,⁵ a railway was held not to be responsible for a wilful assault by one passenger causing the death of another

¹ L. R. 8 Q. B. 161.

² *Ry. v. Valleley*, 32 Ohio St. 345; *P., C. & St. L. Ry. v. Vandyne*, 57 Ind. 576; *B., P. & C. R. R. v. McDonald*, 68 Ind. 316; *Lemont v. W. & G. R. R.*, 1 Mackey (D. C.) 180, 1 Am. & Eng. R. R. Cas. 263.

³ 53 Penna. St. 512.

⁴ 6 Irish C. L. 199.

⁵ 55 N. Y. 108.

passenger, where the servants of the railway had no knowledge of the character or disposition of the wrongdoer, and no reason to apprehend that he would commit an act of violence. Nor is the railway liable to a passenger for the value of securities of which that passenger is robbed by violence as he is leaving the train on its arrival at a station.¹ Nevertheless, the duty of the railway requires it to protect its passengers from the disorderly acts of other passengers and of strangers, provided that the parties causing the disorder are not sufficiently numerous or strong to overthrow the authority of the railway servants; for in such a case the servants are negligent in not removing or controlling the disorderly persons; thus, in *P. & C. R. R. v. Pillow*,² where the plaintiff had been injured in the course of a fight in defendant's car between two other passengers, defendant's servants negligently omitting to restore order, it was held that the plaintiff was entitled to recover.³ Upon the same principle the railway is liable to a passenger, who, while alighting at a station is pushed off the steps of the car by a crowd of passengers.⁴ The railway is also liable for injuries done to its passengers by the wrongful and wilful acts of its servants, if the railway has been negligent, either in its selection or retention of the wrongdoer in the service; or if it has subsequently ratified the servant's unauthorized act by retaining him in the service, and *a fortiori* promoting him, after his wrongful act has been brought to the

¹ *Weeks v. N. Y., N. H. & H. R. R.*, 72 N. Y. 50.

² 76 Penna. St. 510.

³ See also, *Flint v. N. & N. Y. T. Co.*, 34 Conn. 554; *Britton v. A. & C. R. R.*, 88 N. C. 536, 18 Am. & Eng. R. R. Cas. 391; *Hendricks v. S. A. R. R.*, 44 N. Y. Sup. Ct. 8; *N. O., St. L. & C. R. R. v. Burke*, 53 Miss. 200; *King v. O. & M. Ry. (U. S. C. C. Ind.)*, 18 Am. & Eng. R. R. Cas. 386.

⁴ *Treat v. B. & L. R. R.*, 131 Mass. 371, 3 Am. & Eng. R. R. Cas. 423; *Hogan v. S. E. Ry.*, 28 L. T. N. S. 271.

knowledge of his superior officer. But if the railway has not expressly or impliedly authorized or ratified the act, or been negligent in the selection or retention of the wrongdoer, it cannot be held liable for his wilful act.

271. The railway is likewise liable for injuries to passengers in its cars caused by a sudden jolting of the car in starting or coming to a stop, and in such cases it is for the jury to say whether or not the plaintiff was contributorily negligent in rising from his seat before the car had stopped.¹ It is the duty of the railway to provide seats for the passengers whom it undertakes to carry;² but the mere failure to provide a seat for a passenger is not such negligence as will render a railway responsible to the passenger, if he, while standing, be thrown down without negligence upon the part of the railway.³ It has, however, been held that the railway is liable to a passenger, who, having entered a crowded car, and no seat being obtainable, rode upon the platform, and was injured while upon the platform;⁴ but these decisions seem to be open to criticism upon the grounds stated in the next section.

XI. CONTRIBUTORY NEGLIGENCE OF PASSENGERS.

272. It is well settled that a passenger who, voluntarily and unnecessarily, places himself in a position of

¹ N. J. R. R. v. Pollard, 22 Wall. 341; C. & P. S. Ferry Co. v. Monaghan, 10 Weekly Notes of Cases (Penna.) 46; W. P. P. Ry. v. Whipple, 5 Id. 68; Barden v. B. C. & F. R. R., 121 Mass. 436; Worthen v. G. T. Ry., 125 Id. 99; Geddes v. M. R. R., 103 Id. 391; Spearman v. C. St. R. R., 57 Cal. 432, 8 Am. & Eng. R. R. Cas. 193; M. P. R. R. v. Marten, Tex., 22 Am. & Eng. R. R. Cas. 409; Dougherty v. M. R. R., 81 Mo. 325, 21 Am. & Eng. R. R. Cas. 497.

² L. & N. R. R. v. Kelly, 92 Ind. 371, 13 Am. & Eng. R. R. Cas. 1.

³ Burton v. W. J. Ferry Co., 114 U. S. 474.

⁴ Werle v. L. I. R. R., 98 N. Y. 650; Colegrove v. H. & N. H. R. R., 20 Id. 492; Willis v. L. I. R. R., 34 Id. 670; Collins v. A. & S. R. R., 12 Barb. 492.

danger cannot hold the railway responsible for injuries of which his position is the efficient cause, as, for instance, where his injuries result from his crossing the line in front of a moving train whose approach is known to him;¹ or from his returning, after a successful escape, to a burning car in order to recover a valise which had been left behind;² or from his riding on an engine,³ or from his riding on a freight car instead of in the caboose, and while there incurring increased danger in adjusting a falling load of timber;⁴ or from his walking on the track in a railway yard;⁵ or from his crossing on the platform of a car of a freight train, apparently ready to start, in order to reach the passenger train, and without notice to those in charge of the freight train;⁶ or from his going on the line, after alighting from a train at a station and standing for a necessary purpose, and without notice to the railway servants on the track behind freight cars which are liable to be moved;⁷ or from his crawling under and between the wheels of a freight train in leaving a railway station;⁸ or from his riding on the platform of a moving car before the train comes to a stop;⁹ but as before stated, it has been held that

¹ *B. & O. R. R. v. State*, 60 Md. 449; *Falkner v. G. S. & W. Ry.*, 5 I. C. L. 213.

² *Hay v. G. W. Ry.*, 37 Up. Can. (Q. B.) 456.

³ *Robertson v. E. Ry.*, 22 Barb. 91; *B. & P. R. R. v. Jones*, 95 U. S. 439; *Rucker v. M. P. R. R.*, 61 Tex. 499, 21 Am. & Eng. R. R. Cas. 245; *Daggett v. I. C. R. R.*, 34 Iowa 284; *cf. W. St. L. & P. Ry. v. Shacklet*, 105 Ill. 364, 12 Am. & Eng. R. R. Cas. 166.

⁴ *Sherman v. H. & St. J. R. R.*, 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589; *Player v. B., C., R. & A. R. R.*, 62 Iowa 723, 12 Am. & Eng. R. R. Cas. 112.

⁵ *Henry v. St. L., K. C. & N. Ry.*, 76 Mo. 288, 12 Am. & Eng. R. R. Cas. 136; *Hallihan v. H. & St. J. R. R.*, 71 Mo. 113, 2 Am. & Eng. R. R. Cas. 117; *Johnson v. B. & M. R. R.*, 125 Mass. 75.

⁶ *C. B. & Q. Ry. v. Dewey*, 26 Ill. 255; *Lewis v. B. & O. R. R.*, 38 Md. 588; *Gahagan v. B. & L. R. R.*, 1 Allen 187.

⁷ *Van Schaick v. H. R. R. R.*, 43 N. Y. 527.

⁸ *M. & C. R. R. v. Copeland*, 61 Ala. 376; *C. R. R. v. Dixon*, 42 Ga. 327.

⁹ *Secor v. T., P. & W. Ry.*, 10 Fed. Rep. 15; *I. C. Ry. v. Green*, 81 Ill. 19;

the failure of the railway to perform its duty of providing the passenger with a seat will excuse his contributory negligence in riding on the platform,¹ yet this doctrine cannot be regarded as reasonable, for if the passenger cannot obtain a seat he may stand within the car, or he may refuse to proceed on the journey, and may hold the railway responsible for the damages resulting from its breach of contract; but injuries resulting primarily from his voluntarily putting himself in a position of such obvious danger as that of riding on the platform of a car in motion cannot be said to have been proximately caused by the railway's failure to provide him with a seat.

273. It is also contributory negligence in the passenger to put his head or arm out of the window of a car in motion.² On the other hand, in *N. J. R. R. v. Kennard*,³ the railway was held to be negligent because it did not so bar its windows as to physically prevent passengers from putting their heads or arms through those windows, but that case is overruled by the later cases in Pennsylvania. In *C. & A. R. R. v. Pondrom*,⁴ it was held that the negligence of the passenger in permitting his arm to rest on the window sill and to extend outside was slight in comparison with the negligence of the railway in permitting cars on different tracks to be

Blodgett v. Bartlett, 50 Ga. 353; *A. G. S. Ry. v. Hawk*, 72 Ala. 12; *C. & A. R. R. v. Hoosey*, 99 Penna. St. 492; *Hickey v. B. & L. R. R.*, 14 Allen 429; *Quinn v. I. C. R. R.*, 51 Ill. 495; *M. & W. R. R. v. Johnson*, 38 Ga. 409; *P. R. I. & St. L. R. R. v. Coultas*, 67 Ill. 398.

¹ *Willis v. L. I. R. R.*, 34 N. Y. 670; *Zemp v. W. & M. R. R.*, 9 Rich. L. 84; *Maguire v. M. R. R.*, 115 Mass. 239.

² *Todd v. O. C. R. R.*, 3 Allen 18, 7 Id. 207; *P. R. R. v. McClurg*, 56 Penna. St. 294; *I. & C. R. R. v. Rutherford*, 29 Ind. 83; *P. & C. R. R. v. Andrews*, 39 Md. 329; *Holbrook v. U. & S. R. R.*, 12 N. Y. 236; *Dun v. S. & R. R. R.*, 78 Va. 645, 16 Am. & Eng. R. R. Cas. 363; *L. & N. R. R. v. Siekings*, 5 Bush. (Ky.) 1; *Dale v. D., L. & W. R. R.*, 73 N. Y. 468.

³ 21 Penna. St. 203.

⁴ 51 Ill. 333,

in such close proximity as to cause the injury for which the plaintiff sued, and that, therefore, under the doctrine of comparative negligence the plaintiff was entitled to recover. In *Spencer v. M. & P. I. C. R. R.*,¹ *Winters v. H. & St. J. R. R.*,² and *Summers v. C. C. R. R.*,³ it is held that it is not necessarily contributory negligence in a passenger to put his head or arm out of a car window, and that it is for the jury to decide whether or not, under all the circumstances of the particular case, the act is so negligent as to bar his recovery. The right doctrine seems to be that of *Todd v. O. C. R. R.*, and the cases of its class, for the placing by a passenger of any portion of his person outside of the window of a car in motion is so obviously dangerous that adults of average mental capacity instinctively refrain from it. But where the passenger having rested his arm on the sill of the window within the car, it was jostled out and injured by a collision with a freight car which had been negligently left on a siding in such a position that the car carrying the passenger must strike it, the railway was properly held liable.⁴ So the railway was held liable where the passenger's arm similarly placed within a street car was jolted out by a collision of that car with another car upon a different track, on a curve which was so sharp that the cars necessarily struck in passing;⁵ so the railway was held liable where a passenger in a street car while in the act of taking his seat, having rested his hand on the base of an open window, it was struck by a projecting sewer plank.⁶

274. It is contributory negligence in a passenger to

¹ 17 Wisc. 487.

² 39 Mo. 468.

³ 34 La. An. 139.

⁴ *Farlow v. Kelly*, 108 U. S. 288.

⁵ *G. P. Ry. v. Brophy*, 105 Penna. St. 38, 16 Am. & Eng. R. R. Cas. 361.

⁶ *Dahlberg v. M. St. Ry.*, 32 Minn. 404, 18 Am. & Eng. R. R. Cas. 202. See also *Dickinson v. P., H. & N. W. R. R.*, 18 N. W. Rep. (Mich.) 553.

ride in a baggage, or other car, not intended for the carriage of passengers, save with the consent of the railway,¹ provided, of course, that the position of the passenger was a contributing cause of his injury, and was, in itself, so dangerous a place that a man of ordinary prudence would not have voluntarily occupied it under ordinary circumstances. Baggage cars and luggage vans are not primarily intended for the carriage of passengers. It is, in case of accident to the train, dangerous to be in them, not only because they are in general coupled to the engine drawing the train, and preceding the passenger cars, but also because, in case of derailment or collision, the boxes and trunks in the baggage car are violently thrown about. It is, therefore, not reasonable to hold the railway liable to one whose injuries have been caused by his imprudence in voluntarily riding in such a car. It is, of course, not contributory negligence in a passenger to ride in a passenger car other than that in which he has been assigned to a seat.²

275. If the passenger assumes a position of danger at the invitation of a servant of the railway, or under an express or implied representation by a servant of the railway that he may safely occupy the position, the railway will, in general, be held liable for the injuries resulting therefrom;³ thus, in *B. & O. R. R. v. State*, to

¹ *H. & T. C. R. R. v. Clemons*, 55 Tex. 88, 8 Am. & Eng. R. R. Cas. 396; *K. C. R. R. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. R. Cas. 79; *P. R. R. v. Langdon*, 92 Penna. St. 21, 1 Am. & Eng. R. R. Cas. 87; *P. & R. I. R. R. v. Lane*, 83 Ill. 448; *Higgins v. H. & St. J. R. R.*, 36 Mo. 418; *cf. Watson v. N. Ry.*, 24 Up. Can. (Q. B.) 98; *Jacobus v. St. P. & C. Ry.*, 20 Minn. 125.

² *Penna. Co. v. Roy*, 102 U. S. 451.

³ *O'Donnell v. A. V. R. R.*, 59 Penna. St. 239; *Dunn v. G. T. R. R.*, 58 Me. 187; *Edgerton v. N. Y. C. R. R.*, 39 N. Y. 227; *N. & C. R. R. v. Erwin*, Tenn., 3 Am. & Eng. R. R. Cas. 465; *I. & St. L. R. R. v. Horst*, 93 U. S. 291; *L. & N. R. R. v. Kelley*, 92 Ind. 371, 13 Am. & Eng. R. R. Cas. 1; *Pool v. C. R. R.*, 56 Wisc. 227; *St. L., I. M. & S. R. R. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. R. Cas. 198; *G. R. R. & B. Co. v. McCurdy*, 45 Ga. 288;

use of Mahone,¹ and in *Warren v. F. R. R.*,² the railway was held liable to passengers who, upon the invitation of and in company with a station master, while crossing the line to enter a car, were struck by an engine moving upon an intervening track. So in *P. R. R. v. McCloskey*,³ the railway was held liable to a passenger who was injured by reason of his obedience to specific instructions of the railway's servants, requiring him to place himself in a particular car, although those specific instructions were at variance with the railway's general regulations. So in *C., C., C. & I. R. R. v. Manson*,⁴ *L. & N. R. R. v. Kelly*,⁵ and in *McIntyre v. N. Y. C. R. R.*,⁶ railways were held liable to passengers who were injured while passing from one car to another of a train in motion, under the direction of the conductor. So in *N. & C. R. R. v. Erwin*,⁷ the railway was held liable to one, who, having arrived at a station too late for his train, got upon an engine at the invitation of the station master, and while journeying on the line in the engine for the purpose of overtaking his train, was injured by the negligence of servants of the railway. So in *St. L., I. M. & S. R. R. v. Cantrell*,⁸ the railway was held liable to a passenger who, at the suggestion of the conductor, jumped from the platform of a slowly moving train and was injured.⁹ So in

Lambeth v. N. C. R. R., 66 N. C. 494; *Filer v. N. Y. C. & H. R. R. R.*, 59 N. Y. 351; *Creed v. P. R. R.*, 86 Penna. St. 139; *Colegrove v. N. Y. & H. & N. Y. & N. H. Ry.*, 20 N. Y. 492; *C., C., C. & I. R. R. v. Manson*, 30 Ohio St. 451; *Waterbury v. N. Y. C. & H. R. R. R.*, 17 Fed. Rep. 671; *C. B. & Q. R. R. v. Sykes*, 96 Ill. 162, 2 Am. & Eng. R. R. Cas. 254.

¹ 63 Md. 135, 21 Am. & Eng. R. R. Cas. 202.

² 8 Allen 227.

³ 23 Penna. St. 526.

⁴ 30 Ohio St. 451.

⁵ 92 Ind. 371, 13 Am. & Eng. R. R. Cas. 1.

⁶ 37 N. Y. 287.

⁷ Tenn. , 3 Am. & Eng. R. R. Cas. 465.

⁸ 37 Ark. 519, 8 Am. & Eng. R. R. Cas. 198.

⁹ See also *Filer v. N. Y. C. R. R.*, 59 N. Y. 351; *G. R. R. v. McCurdy*, 45 Ga. 288; *Bucher v. N. Y. C. & H. R. R. R.*, 98 N. Y. 128, 21 Am. & Eng. R. R. Cas. 361.

Allender *v.* C. R. I. & P. Ry.,¹ the railway was held liable to a passenger who was injured while under the direction of the railway conductor, entering a car at rest, but not in position at the usual platform. So in O'Donnell *v.* A. V. R. R.,² the railway was held liable to a passenger who was injured while riding in a baggage car in violation of a rule of the railway, but with the assent of the conductor of the train. So in C. B. & Q. R. R. *v.* Sykes,³ an intending passenger was held not to be necessarily contributorily negligent in passing, on the invitation of a conductor, under a freight car which barred his way to the station.

276. The fact that a servant of the railway invited, or even directed the passenger to occupy a position of danger will not render the railway liable for injuries resulting therefrom, if the danger was so obvious, that a reasonable man would not have obeyed the servant, or accepted his invitation;⁴ nor will the railway be liable to a passenger who is injured in alighting at a dangerous place, because the conductor tells him that passengers sometimes alight there, but does not either invite or command the particular passenger to alight at that point.⁵ Nor will the railway be held responsible if the servant was not expressly, or impliedly, authorized to give the invitation.⁶ In particular is this the case when the general regulations of the railway for the protection of the passenger forbid him to occupy a position of danger, as, for instance, to ride in the baggage car. On

¹ 43 Iowa 276.

² 59 Penna. St. 239.

³ 96 Ill. 162, 2 Am. & Eng. R. R. Cas. 254.

⁴ Hazzard *v.* C. B. & Q. R. R., 1 Biss. 503; C. & A. R. R. *v.* Randolph, 53 Ill. 510; B. & P. R. R. *v.* Jones, 95 U. S. 439; S. W. R. R. *v.* Singleton, 67 Ga. 306, 66 Id. 252; S. & N. A. R. R. *v.* Schaufler, 75 Ala. 136, 21 Am. & Eng. R. R. Cas. 405.

⁵ C. B. & Q. R. R. *v.* Hazzard, 26 Ill. 373.

⁶ L. R. & F. S. Ry. *v.* Miles, 40 Ark. 298; Duff *v.* A. V. R. R., 91 Penna St. 458; Flower *v.* P. R. R., 69 Id. 210; P. R. R. *v.* Landgon, 92 Id. 21.

this point Paxson, J., says with great force in *P. R. R. v. Langdon*,¹ "the rules adopted by railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the management of its business. Others are for the comfort of passengers, and yet others have exclusive regard to the safety of passengers. The distinction between them, and the difference in the consequences of their violation is manifest. As an illustration: it would be unreasonable to hold that the violation of the rule against smoking could be set up as a defence to an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and as a consequence should be injured, I apprehend it would be a good defence to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident, by which the injury was occasioned. And if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train and may assign passengers their seats, but he may not assign a passenger to a seat on the cow-catcher, a position on the platform, or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable

¹ 92 Penna. St. 21, 28.

to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. It was said by Woodward, J., in *Sullivan v. The Railroad Company*,¹ 'that on the part of the passenger his assent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars, and if injury befall him by reason of his disregard of regulations, which are necessary to the conduct of the business of the company, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief.' This principle is even broader than the one we are now contending for. We only assert here, that if a passenger wilfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury."

277. The conditions of travel on a street car are, of course, different from those on lines of railway whose cars are propelled at the higher rate which the use of steam as a motor makes possible, and it is not necessarily contributory negligence to ride on the platform of a street car;² nor to leave one's seat in a street car and to stand on the rear platform, on which there is an accumulation of ice and snow;³ nor to stand on the front

¹ 30 Penna. St. 234.

² *Meesel v. L. & B. R. R.*, 8 Allen 234; *Spooner v. B. C. R. R.*, 54 N. Y. 230; *G. P. Ry. v. Walling*, 97 Penna. St. 55; *Maguire v. M. R. R.*, 115 Mass. 237; *Sheridan v. B. & N. R. R.*, 36 N. Y. 39; *Clark v. 8th Ave. R. R.*, Id. 135; *Burns v. B. R. R.*, 50 Mo. 139; *Nolan v. B. C. & N. R. R.*, 87 N. Y. 63, 3 Am. & Eng. R. R. Cas. 463; 13th & 15th Sts. P. Ry. v. *Boudrou*, 92 Penna. St. 480, 8 Weekly Notes of Cases (Penna.) 244.

³ *Fleck v. U. Ry.*, 134 Mass. 480, 16 Am. & Eng. R. R. Cas. 372.

step of a horse car;¹ nor to get on or off a moving street car;² but it has been held to be contributory negligence to attempt to get on the front platform of a moving street car whose step is obviously broken;³ or to sit on the railing of the platform of a street car;⁴ or to sit on the step of a street car.⁵ A street railway is, of course, not liable to a passenger who is injured while standing on the step of the front platform by being jolted off by an ordinary movement of the car.⁶ A street railway in operating street cars is not bound to prevent passengers from getting on and off the front platform of a car by guards or fenders, but the absence of such means of protection may properly be considered by the jury in determining whether or not the railway failed in its duty to one who was injured while alighting from the front platform;⁷ yet in *W. P. P. Ry. v. Gallagher*,⁸ judgment for the plaintiff was reversed by the same court which had decided *P. C. P. Ry. v. Hassard*, because the judge at the trial left it to the jury to find the railway negligent in failing to provide such guards or fenders.

278. Where the railway voluntarily accepts as a passenger one whose physical disability is apparent, or is made known to its servants, and renders special assistance necessary, the railway is negligent if such assist-

¹ *W. P. P. Ry. v. Gallagher*, 16 Weekly Notes of Cases (Penns.) 413.

² *C. C. Ry. v. Mumford*, 97 Ill. 560, 3 Am. & Eng. R. R. Cas. 312; *McDonough v. M. R. R.*, 137 Mass. 210, 21 Am. & Eng. R. R. Cas. 354; *Eppendorf v. B. C. R. R.*, 69 N. Y. 195.

³ *Dietrich v. B. & H. S. Ry.*, 58 Md. 347, 11 Am. & Eng. R. R. Cas. 115.

⁴ *Ginna v. S. A. R. R.*, 67 N. Y. 596; *Downey v. Hendrie*, 46 Mich. 498, 8 Am. & Eng. R. R. Cas. 386.

⁵ *Wills v. L. & B. Ry.*, 129 Mass. 351, 2 Am. & Eng. R. R. Cas. 27.

⁶ *F. S. & G. St. F. R. R. v. Hayes*, 97 N. Y. 259, 21 Am. & Eng. R. R. Cas. 358.

⁷ *P. C. P. Ry. v. Hassard*, 75 Penna. St. 367.

⁸ 16 Weekly Notes of Cases (Penns.) 413.

ance be not afforded.¹ It has been held that where the physical condition of the person injured is at the time of the injury such that the injuries caused by negligence on the part of the railway are thereby aggravated, the railway is not liable for that aggravation;² but the more correct view seems to be that taken in those cases which hold that a defendant is equally responsible for injuries inflicted by his negligence, and for an aggravation of those injuries by reason of the impaired physical condition of the person injured prior to and at the time of the injury.³

279. It is the duty of the railway, whatever be the means of conveyance which it uses, to provide everything which is essential to the safety of the passenger and reasonably consistent with the transportation of the passenger by the particular means of conveyance so used; thus one who has been accepted as a passenger to be carried in a freight train is entitled to the same character, though not to the same degree, of protection as if he were carried in a passenger train.⁴

280. The stringent obligations which the law imposes upon common carriers of passengers are not applicable to individuals occasionally carrying passengers gratuit-

¹ *T. W. & W. R. R. v. Baddeley*, 54 Ill. 19; *C. C. I. R. R. v. Powell*, 40 Ind. 37; *Millmann v. N. Y. C. & H. R. R. R.*, 66 N. Y. 642; *Sheridan v. B. C. R. R.*, 36 N. Y. 39; *N. O., J. & G. N. R. R. v. Statham*, 42 Miss. 607.

² *P. P. C. Co. v. Barker*, 4 Colo. 344.

³ *Allison v. C. & N. W. Ry.*, 42 Iowa 274; *Brown v. C. M. & St. P. Ry.*, 54 Wisc. 342, 3 Am. & Eng. R. R. Cas. 444; *Fitzpatrick v. G. W. Ry.*, 12 Up. Can. (Q. B.) 645; *Stewart v. Ripon*, 38 Wisc. 584.

⁴ *Murch v. C. R. R.*, 29 N. H. 9; *C. B. & Q. R. R. v. Hazzard*, 26 Ill. 373; *I. R. R. v. Beaver*, 41 Md. 493; *I. & St. L. R. R. v. Horst*, 93 U. S. 291; *C. & G. R. R. v. Fay*, 16 Ill. 568; *Edgerton v. N. Y. & H. R. R. R.*, 39 N. Y. 227; *Dunn v. G. T. Ry.*, 58 Me. 187.

As to the restricted statutory liability of railways in Mississippi to passengers on freight trains, see Code 1880, § 1054; *Perkins v. C. St. L. & N. O. R. R.*, 60 Miss. 726, 21 Am. & Eng. R. R. Cas. 242.

tously;¹ nor to railway contractors, who, in the course of constructing a line, occasionally carry passengers for hire;² nor are statutory regulations for the running of trains which have been enacted for the protection of passengers applicable to construction trains run by contractors upon an uncompleted line.³

¹ *Moffatt v. Bateman*, L. R. 3 P. C. 115.

² *Shoemaker v. Kingsbury*, 12 Wall. 369.

³ *Griggs v. Houston*, 104 U. S. 553.

CHAPTER VII.

THE LIABILITY OF THE RAILWAY TO THE PERSONS INCLUDED IN THE FIFTH CATEGORY, THAT IS, THE SERVANTS OF THE RAILWAY.

- I. The general principle determining the liability of the railway to its servants.
- II. The duty of the railway in its original construction and subsequent maintenance in repair of its line, rolling stock, and appliances.
- III. The duty of the railway in its selection and retention of servants.
- IV. The duty of the railway in its operation of its line.
- V. The liability of railways to their servants for the negligence of other servants.
- VI. The servant's implied undertaking to take upon himself the risks of the service.
- VII. Minor servants.
- VIII. The servant's contributory negligence.
- IX. Statutes affecting the liability of railways to their servants.

I. THE GENERAL PRINCIPLE DETERMINING THE LIABILITY OF THE RAILWAY TO ITS SERVANTS.

The railway is liable to its servants only for negligence.

281. In the term "servants" there are included all of the railway's officers and employés of every grade who are engaged in the operation of its line. I use the name "servant" rather than "employé," not only because it is of larger import, but also because the relation of "master and servant" has long been a recognized topic in the law, and the use of the term "servant" renders more easy the reference to the many adjudged cases which deal with that relation. The nature and extent of the liability of railways for injuries to their servants in the course of railway operations is determin-

able upon the general principles which are applicable to the relation of servants to other masters acting in their individual capacities. Masters do not insure the safety of their servants; and they are liable to them only for negligence, that is, for a non-performance of duty causing injury to the servants. The relation between masters and their servants being purely voluntary and contractual, the nature and extent of the master's duty is necessarily dependent upon the terms, whether express or implied, of the contract of service. If there be an express contract of service defining the master's liability, its terms must govern, but in the absence of any such contract the implied obligation of the master is only that he shall not be negligent in his personal participation in the work, nor in the personal participation in the work of any one whom he has put in his place to represent him, and, in the exercise of an uncontrolled discretion, to conduct the business for him; nor in the provision of the machinery and appliances to be operated by the servant, nor in failing to repair machinery and appliances which, although originally sound, have become dangerously defective, and whose condition either is, or ought to be, known to him; nor in the original selection, or subsequent retention in the service, of servants whose incompetency either is, or ought to be, known to him. This being the extent of the master's implied obligation to the servant, it follows, not only that the servant must be held by reason of the voluntary character of his engagement in the service, to have assumed the risks of danger to himself necessarily incident to the character of the service for which he engaged, including the risks of the negligence of his fellow-servants, but also that the servant cannot hold the master liable for an injury to the happening of which his, the servant's, negligence has contributed. The general prin-

ciples thus stated are fully supported by the authorities. The leading case is *Priestley v. Fowler*,¹ where, in an action by a servant against his master, a butcher, for injuries received by the breaking down of an overloaded van, after verdict for the plaintiff judgment was arrested on the ground, as stated by Abinger, C. B., that "from the mere relation of master and servant no contract, and, therefore, no duty can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant arising from any vice or imperfection unknown to the master in the carriage, or in the mode of loading and conducting it;" and in elucidation of this general principle, the Lord Chief Baron said, the master "is, no doubt, bound to provide for the safety of his servant, in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which injury may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. * * * In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise in behalf of his master to protect him against the misconduct, or negligence, of others who serve him, and which diligence and caution, while they protect the master are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master than any recourse against his master for damages could afford." So in *Wilson v. Merry*,² where the

¹ 3 M. & W. 1.

² L. R. 1 Sc. & Div. 326.

owners and operators of a mine were sought to be held liable for the death of a miner, Cairns, L. C., said : "the master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted, or undertaken, with his servant to do. The master has not contracted nor undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent, personally, to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate material and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do." So in *Ormond v. Holland*,¹ where the defendants were builders and the plaintiff was a servant, who, while ascending a ladder at a building in course of construction by the defendants, was injured by the breaking of one of the rounds of the ladder and a fall therefrom, there being no proof that the defective condition of the ladder had been in any way brought home to the knowledge of the defendants, Campbell, C. J., directed a verdict for the defendants, and a rule to enter the verdict for the plaintiff was discharged, Campbell, C. J., saying : "we all agree that the action is not maintainable. There was no evidence of personal negligence; the builders used due and rea-

¹ El. Bl. & El. 102, 96 E. C. L.

sonable care to have competent servants; and I think they used more than ordinary care, and took extraordinary precaution, that the plant should be sufficient. There being no evidence of personal negligence, either by interference in the work, or in hiring the servants, or in choosing the implements, I am inclined to take some blame to myself for encouraging this application to the court; for, according to both decided cases and to principle, it must fail." So in *Warner v. E. Ry.*,¹ where it was sought to hold the railway liable for injuries to a servant caused by the fall of a bridge which had been carefully constructed and frequently inspected, judgment for the plaintiff was reversed in error, Bacon, J., saying, *inter alia*: "the only ground which the law recognizes of liability on the part of the defendant is that which arises from personal negligence, or such want of care and prudence in the management of its affairs, or in the selection of its agents or appliances, the omission of which occasioned the injury, and which, if they had been exercised, would have averted it." All of the cases which are cited in this chapter serve to illustrate the proposition as stated by Bacon, J., for, however widely they may differ in their finding of that which constitutes negligence under any particular state of facts, they agree in holding negligence on the part of the railway to be the test of its liability.

282. The liability of the railway to its servants being dependent upon its negligence, it is not liable for injuries to them resulting from inevitable accidents, such as the fall of a bridge which had been skilfully constructed and carefully inspected;² nor the explosion of the boiler of an engine from causes which could not

¹ 39 N. Y. 468

² *Warner v. E. Ry.*, 39 N. Y. 468.

have been detected nor guarded against;¹ nor the breaking of a rail by frost;² nor the throwing of a mail bag by a mail agent from a passing train upon a station platform, when the railway had no reason to expect that the bag would be thrown upon the platform;³ nor the formation of a poisonous substance by the decay of the grease in an axle-box, and the communication of that poison to a cut in the servant's hand, the railway having no reason to anticipate that any poisonous substance would result from the decay of the grease;⁴ nor the sudden reversal of the engine and stoppage of a train of construction cars to avoid a collision with cattle on the line, thereby throwing off a laborer who was upon the last car of the train;⁵ nor the movement of a car upon a siding by the shifting of another car on to the siding, thereby killing a servant who was standing behind it, when the other servants, who were doing the shifting, had no reason to suppose that any one would be injured by the movement of that car;⁶ nor the fall of a brakeman from a moving train when the proof fails to show why he fell;⁷ nor the derailment of a train by a misplaced switch, the evidence not showing when, how, or by whom the switch was misplaced;⁸ nor a collision between a hand-car and a train, which was caused by the fact that the foreman's watch was slower than that of the conductor of the colliding train;⁹

¹ I. C. Ry. v. Houck, 72 Ill. 285; T. W. & W. Ry. v. Moore, 77 Id. 217; I B. & W. Ry. v. Toy, 91 Id. 474.

² Henry v. L. S. & M. S. Ry., 49 Mich. 495, 8 Am. & Eng. R. R. Cas. 110.

³ Muster v. C. M. & St. P. Ry., 61 Wisc. 325, 18 Am. & Eng. R. R. Cas. 113.

⁴ Kitteringham v. S. C. & P. Ry., 62 Iowa 285, 18 Am. & Eng. R. R. Cas. 14.

⁵ M. P. Ry. v. Haley, 25 Kans. 35, 5 Am. & Eng. R. R. Cas. 594; cf. Jeffrey K. & D. M. R. R., 56 Iowa 546, 5 Am. & Eng. R. R. Cas. 568.

⁶ Hallihan v. H. & St. J. R. R., 71 Mo. 113, 2 Am. & Eng. R. R. Cas. 117.

⁷ Corcoran v. B. & A. R. R., 133 Mass. 507; P. & R. R. R. v. Schertle, 97 Penna. St. 450, 2 Am. & Eng. R. R. Cas. 158.

⁸ Tinney v. B. & A. R. R., 62 Barb. 218.

⁹ Weger v. P. R. R., 55 Penna. St. 460.

nor the slipping of a servant from the step as he was climbing on a moving engine to make a coupling.¹

283. As the liability of the railway to its servants is dependent upon the fact of its negligence, it is bound to its servants to exercise in its construction and in its maintenance in repair of its line, rolling stock and appliances of labor, in its operation of its line, in the conduct of its business, and in its selection of its servants of every rank, that degree of care which will tend to secure its servants' safety to as great an extent as is compatible with the conduct of an essentially hazardous business by the use of human instrumentalities.

II. THE DUTY OF THE RAILWAY TO ITS SERVANTS IN THE ORIGINAL CONSTRUCTION AND SUBSEQUENT MAINTENANCE IN REPAIR OF ITS LINE, ROLLING STOCK, MACHINERY AND APPLIANCES.

The duty of the railway to its servants requires the exercise of care on its part in the original construction, inspection, and maintenance in repair of its line, rolling stock, and appliances.

284. Railways do not warrant to their servants the safe condition of their line, nor the security of their appliances and machinery, and they guarantee only that due care shall be used in constructing and in keeping in repair, and in operating the line, appliances and machinery.² Ruger, C. J., in *Probst v. Delama-*

¹ *Jackson v. K. C. L. & S. K. R. R.*, 31 Kans. 761, 15 Am. & Eng. R. R. Cas. 178.

² *Clark v. Holmes*, 7 H. & N. 937; *Williams v. Clough*, 3 Id. 258; *Murphy v. Crossan*, 98 Penna. St. 495; *Johnson v. Bruner*, 61 Id. 58; *Murray v. Phillips*, 35 L. T. 477; *Hough v. T. P. Ry.*, 100 U. S. 213; *Ford v. F. R. R.*, 110 Mass. 241; *Holmes v. Worthington*, 2 F. & F. 533; *L. & N. R. R. v. Orr*, 84 Ind. 50, 8 Am. & Eng. R. R. Cas. 94; *Fuller v. Jewett*, 80 N. Y. 46; *L. S. & M. S. Ry. v. McCormick*, 74 Ind. 440; *Umback v. L. S. & M. S. Ry.*, 83 Ind. 191, 8 Am. & Eng. R. R. Cas. 98; *Gates v. S. M. Ry.*, 28 Minn. 116, 2 Am. & Eng. R. R. Cas. 237; *Cooper v. C. R. R.*, 44 Iowa 134; *Wedgwood v. C. & N.*

ter,¹ thus states the rule : "the duty of the master to furnish safe, suitable, and sound tools, machinery and appliances, for the use of the servant in the performance of the work of the master, and to keep them in repair, is not an absolute one, and is satisfied by the exercise of reasonable care and prudence on the part of the master in the manufacture, selection, and repair of such appliances. * * * Yet, when the master has exercised all of the care and caution which a prudent man would take for the safety and protection of his own person, the law does not hold him liable for the consequences of a defect which could not be discovered by careful inspection, or the application of appropriate tests to determine its existence."

285. Railways are not bound to their servants to provide the best possible appliances, but they are bound only to supply such appliances as are in use by well managed railways, and which they have skilfully constructed and carefully maintained in repair.² Miller, J., thus puts it in *Marsh v. Chickering*,³ "the rule is that the master does not owe to his servants the duty to furnish

W. Ry., 44 Wise. 44; T. W. & W. Ry. *v.* Asbury, 84 Ill. 429; Kain *v.* Smith, 80 N. Y. 458; Howd *v.* M. C. R. R., 50 Miss. 178; Batterson *v.* C. & G. T. Ry., 49 Mich. 184, 8 Am. & Eng. R. R. Cas. 123; Wonder *v.* B. & O. R. R., 32 Md. 411; C. & A. R. R. *v.* Shannon, 43 Ill. 338; M. R. & L. E. R. R. *v.* Barber, 5 Ohio St. 541; Probst *v.* Delamater, 100 N. Y. 266.

¹ 100 N. Y. 266, 272.

² *Brown v. A. C. S. & M. Co.*, 3 H. & C. 511; *M. C. & C. Co. v. McEnery*, 91 Penna. St. 185; *L. R. & F. S. R. R. v. Duffey*, 35 Ark. 602; *Wonder v. B. & O. R. R.*, 32 Md. 411; *King v. B. & W. R. R.*, 9 Cush. 112; *L. S. & M. S. Ry. v. McCormick*, 74 Ind. 440 (qualifying *St. L. & S. E. Ry. v. Valarius*, 56 Id. 511); *McGinnis v. C. S. B. Co.*, 49 Mich. 466, 8 Am. & Eng. R. R. Cas. 135; *Schall v. Cole*, 107 Penna. St. 1; *Cooper v. C. R. R.*, 44 Iowa 134; *P. & C. R. R. v. Sentmayer*, 92 Penna. St. 275; *Cagney v. H. & St. J. R. R.*, 69 Mo. 416; *T. W. & W. Ry. v. Fredericks*, 71 Ill. 294; *T. W. & W. Ry. v. Asbury*, 84 Id. 429; *Smith v. N. Y. & H. R. R.*, 19 N. Y. 127; *Disher v. N. Y. C. & H. R. R.*, 94 N. Y. 622, 15 Am. & Eng. R. R. Cas. 233; *Burke v. Witherbee*, 98 N. Y. 562.

³ 101 N. Y. 396, 400.

the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable; such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances." As the duty of a railway to its servants does not require it to provide the best possible appliances, nor to insure its servants against the ordinary dangers of the service, the railway is not liable to freight brakemen because the bridges over its line are not sufficiently high to permit brakemen to stand safely on the roofs of cars moving under such bridges;¹ nor because its line is not ballasted, or is intersected with ditches;² nor because its switch frogs are not blocked;³ nor because it has delayed for any length of time to repair a car which is not in use, and which has not been left in a position of danger;⁴ nor because it has not an uniform coupling for all of its engines and cars;⁵ nor because its car platforms are of

¹ P. & C. R. R. v. Sentmayer, 92 Penna. St. 276, 5 Am. & Eng. R. R. Cas. 508; Owen v. N. Y. C. R. R., 1 Lans. 108; Devitt v. P. R. R., 50 Mo. 302; B. & O. R. R. v. Stricker, 51 Md. 47; Rains v. St. L., I. M. & S. Ry., 71 Mo. 164, 8 Am. & Eng. R. R. Cas. 610; Wells v. B. C. R. & N. R. R., 56 Iowa 520, 2 Am. & Eng. R. R. Cas. 243; Baylor v. D. L. & W. R. R., 40 N. J. L. 23; Gibson v. M. Ry., 2 Ont. (Can.) 653; Clark v. B. & D. R. R., 78 Va. 709, 18 Am. & Eng. R. R. Cas. 78; *sed contra*, B. & O. & C. R. R. v. Rowan, Ind. , 23 Am. & Eng. R. R. Cas. 390.

² P. & R. R. R. v. Schertle, 97 Penna. St. 450, 2 Am. & Eng. R. R. Cas. 158; DeForrest v. Jewett, 88 N. Y. 264, 8 Am. & Eng. R. R. Cas. 495; Williams v. C. R. R., 43 Iowa 396; Gates v. S. M. Ry., 28 Minn. 110, 2 Am. & Eng. R. R. Cas. 237; Penna. Co. v. Hankey, 93 Ill. 580.

³ McGinnis v. C. S. B. Co., 49 Mich. 466, 8 Am. & Eng. R. R. Cas. 135; L. S. & M. S. Ry. v. McCormick, 74 Ind. 440; cf. Meyers v. C. R. I. & P. Ry., 57 Iowa 555, 8 Am. & Eng. R. R. Cas. 527.

⁴ Flanagan v. C. & N. W. Ry., 45 Wisc. 98, 50 Id. 462, 2 Am. & Eng. R. R. Cas. 150.

⁵ M. C. R. R. v. Smithson, 45 Mich. 212, 1 Am. & Eng. R. R. Cas. 101; I. B. & W. R. R. v. Flanigan, 77 Ill. 365; Whitman v. W. & M. Ry., 58 Wisc. 408, 12 Am. & Eng. R. R. Cas. 214; Kelly v. W. C. Ry., Wisc. , 21 Am. & Eng. R. R. Cas. 633.

unequal height;¹ nor because the car couplings work slowly.²

, *The duty of the railway to its servants requires frequent and thorough inspections of its line and appliances.*

286. In order that the railway may be assured that its line, rolling stock, and appliances are in a reasonably safe condition, the duty devolves upon it of causing as frequent and thorough inspections of its line and appliances to be made as can be done consistently with the conduct of its business, and the railway which neglects to perform that duty of inspection is liable to a servant injured by reason of any defect in the line, rolling stock, or appliances which such an inspection ought to have detected.³ Under circumstances of more than ordinary peril, as in the case of violent storms, it is the duty of the railway to inspect its line with more than ordinary promptitude and thoroughness, and in particular to examine such portions of it as are peculiarly liable to injury by storms, such as embankments.⁴ It is also the duty of the railway, in recognition of the necessary deterioration in its line, rolling stock, machinery and appliances, by wear and tear in use, and by decay, //

¹ *Hulett v. St. L., K. C. & N. Ry.*, 67 Mo. 239; *F. W., J. & S. Ry. v. Gildersleeve*, 33 Mich. 133; *I., B. & W. R. R. v. Flanigan*, 77 Ill. 365; *Hodgkins v. E. R. R.*, 119 Mass. 419; *Bottsford v. M. C. Ry.*, 33 Mich. 256; *St. L., I. M. & S. R. R. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. R. Cas. 629; *cf. Ellis v. N. Y., L. E. & W. R. R.*, 95 N. Y. 546; *Cowles v. R. & D. R. R.*, 84 N. C. 309, 2 Am. & Eng. R. R. Cas. 90.

² *Williams v. C. R. R.*, 43 Iowa 396.

³ *Brann v. C. R. I. & P. Ry.*, 53 Iowa 595; *Smoot v. M. & M. Ry.*, 67 Ala. 13; *A. T. & S. F. R. R. v. Holt*, 29 Kans. 149, 11 Am. & Eng. R. R. Cas. 206; *Locke v. S. C. & P. R.*, 46 Iowa 109; *T. W. & W. Ry. v. Conroy*, 68 Ill. 560; *Davis v. C. V. R. R.*, 55 Vt. 84, 8 Am. & Eng. R. R. Cas. 173; *Dale v. St. L., K. C. & N. R. R.*, 63 Mo. 455; *H. & T. C. Ry. v. Dunham*, 49 Tex. 181; *Indiana Car Co. v. Parker*, 100 Ind. 191.

⁴ *Hardy v. N. C. C. R. R.*, 74 N. C. 734; *Gates v. S. M. Ry.*, 28 Minn. 110, 2 Am. & Eng. R. R. Cas. 237.

to exercise care in inspection for the purpose of discovering not only accidental defects but also the effects of deterioration and the progress of decay;¹ thus, where a railway had recently come into possession of a line constructed by another company, it was held not to be liable for injuries resulting from the defective condition of that line, it not being shown that the railway had been negligent either in not inspecting, or in not repairing it,² but where a railway had come into possession, as lessee, of another line, and had operated it without inspection, it was held liable to a servant who had been injured by the fall of a bridge, whose defects could have been discovered if the bridge had been examined by a competent engineer.³

287. If the railway has not been negligent in the original construction, nor in the subsequent inspection of its line, rolling stock, machinery, and appliances, and a servant is, nevertheless, injured by reason of a defect therein, it must be shown, in order to hold the railway liable for the injury, that the officer, whose duty it was to repair it, had been notified of the particular defect which was the cause of the injury.⁴ A master is liable if the machinery or appliances are defective, in that they do not comply with statutory requisites, and if injury to a servant is caused thereby.⁵ A master is liable for his personal negligence in the construction of machinery, and the negligence of the president of a corporation, under such circumstances, is the neglect

¹ *Baker v. A. V. R. R.*, 95 Penna. St. 211, 8 Am. & Eng. R. R. Cas. 141; *Warden v. O. C. R. R.*, 137 Mass. 204, 21 Am. & Eng. R. R. Cas. 612.

² *Batterson v. C. & G. T. Ry.*, 49 Mich. 184, 8 Am. & Eng. R. R. Cas. 123.

³ *Vosburg v. L. S. & M. S. Ry.*, 94 N. Y. 374.

Patterson v. P. & C. R. R., 76 Penna. St. 389; *Porter v. H. & St. J. R. R.*, 71 Mo. 66, 2 Am. & Eng. R. R. Cas. 44; *C. & A. R. R. v. Platt*, 89 Ill. 141; *T. W. & W. Ry. v. Ingraham*, 77 Id. 309; *C. & N. W. Ry. v. Jackson*, 55 Id. 492.

⁴ *Britton v. G. W. Cotton Co.*, L. R. 7 Ex. 130.

of the corporation.¹ Railways are liable if a person of known incompetency has been employed to construct rolling stock, machinery, or appliances,² and, although a competent contractor has been employed for that purpose, the railway is liable for his negligence in construction.

288. The railway must, therefore, exercise care in its construction, inspection, and maintenance in repair of its line, roadbed, and track,³ its embankments,⁴ its bridges and trestles,⁵ its culverts,⁶ its turn-tables,⁷ its

¹ Ardesco Oil Co. v. Gilson, 63 Penna. St. 146; S. R. R. v. Jones, 30 Kans. 601, 15 Am. & Eng. R. R. Cas. 201.

² Potts v. P., C. & D. Ry., 8 W. R. 524.

³ Porter v. H. & St. J. R. R., 71 Mo. 66, 2 Am. & Eng. R. R. Cas. 44; Hawley v. N. C. Ry., 82 N. Y. 370, 2 Am. & Eng. R. R. Cas. 248; Snow v. H. R. R., 8 Allen 441; O'Donnell v. A. V. R. R., 59 Penna. St. 239; I. & C. R. R. v. Love, 10 Ind. 554; Fifield v. N. R. R., 42 N. H. 225; H. & G. N. R. R. v. Randall, 50 Tex. 254; Durkin v. Sharp, 88 N. Y. 225, 8 Am. & Eng. R. R. Cas. 520; Trask v. C. S. R. R., 63 Cal. 96, 11 Am. & Eng. R. R. Cas. 192; Knapp v. S. C. & P. Ry., 65 Iowa 91, 18 Am. & Eng. R. R. Cas. 60; De Forrest v. Jewett, 88 N. Y. 264, 8 Am. & Eng. R. R. Cas. 495; Brickman v. S. C. R. R., 8 S. C. 173; Lewis v. St. L. & I. M. Ry., 59 Mo. 495; Drymala v. Thompson, 26 Minn. 40; Baird v. C. R. I. & P. Ry., 55 Iowa 121, 13 N. W. Rep. 731, 8 Am. & Eng. R. R. Cas. 128; 61 Iowa 359, 12 Am. & Eng. R. R. Cas. 75; H. & T. C. Ry. v. Pinto, 60 Tex. 516, 15 Am. & Eng. R. R. Cas. 286; Batterson v. C. & G. T. Ry., 49 Mich. 184, 8 Am. & Eng. R. R. Cas. 123; Pool v. C. M. & St. P. Ry., 56 Wisc. 227, 8 Am. & Eng. R. R. Cas. 360; P. & R. R. R. v. Schertle, 97 Penna. St. 450, 2 Am. & Eng. R. R. Cas. 158.

⁴ C. R. R. v. Mitchell, 63 Ga. 177, 1 Am. & Eng. R. R. Cas. 145; Gates v. S. M. Ry., 28 Minn. 110, 2 Am. & Eng. R. R. Cas. 237.

⁵ McDermott v. P. R. R., 30 Mo. 115; Warner v. E. Ry., 39 N. Y. 468; Faulkner v. E. Ry., 49 Barb. 324; O. B. Coal Co. v. Reed, 5 Weekly Notes of Cases (Penna.) 3; Paulmier v. E. R. R., 5 Vroom 151; Locke v. S. C. & P. Ry., 46 Iowa 109; T. P. & W. Ry. v. Conroy, 61 Ill. 162; T. W. & W. Ry. v. Conroy, 68 Ill. 560; Mann v. S. C. & P. Ry., 46 Iowa 637; McCune v. N. P. Ry., 18 Fed. Rep. 875, 15 Am. & Eng. R. R. Cas. 172; Koontz v. C. R. I. & P. Ry., 65 Iowa 224, 18 Am. & Eng. R. R. Cas. 85; Elmer v. Locke, 135 Mass. 575, 15 Am. & Eng. R. R. Cas. 300; cf. W. Ry. v. Elliott, 98 Ill. 481, 4 Am. & Eng. R. R. Cas. 651.

⁶ Davis v. C. V. R. R., 53 Vt. 84, 11 Am. & Eng. R. R. Cas. 173.

⁷ L. S. & M. S. Ry. v. Fitzpatrick, 31 Ohio St. 479; Durgin v. Munson, 9 Allen 396; E. T. V. & G. R. R. v. Toppins, 10 Lea (Tenn.) 58, 11 Am. & Eng. R. R. Cas. 222.

sidings,¹ its switches,² its round-houses,³ its engines, including boilers,⁴ cow-catcher,⁵ pilot and whistle,⁶ air-brake,⁷ valves,⁸ oil-cup,⁹ draw-bar,¹⁰ and chafing-irons;¹¹ its derricks, poles, and tackle;¹² its bridge-guards;¹³ its

¹ Patterson *v.* P. & C. R. R., 76 Penna. St. 393.

² Smith *v.* St. L., K. C. & N. Ry., 69 Mo. 32; Ladd *v.* N. B. R. R., 119 Mass. 412; Walker *v.* B. & M. R. R., 128 Id. 8; Piper *v.* N. Y. C. & H. R. R. R., 56 N. Y. 630; Penna. Co. *v.* Roney, 89 Ind. 453, 12 Am. & Eng. R. R. Cas. 223; Slattery *v.* T. & W. R. R., 23 Ind. 81; Randall *v.* B. & O. R. R., 109 U. S. 478, 15 Am. & Eng. R. R. Cas. 243; L. S. & M. S. Ry. *v.* McCormick, 74 Ind. 440, 5 Am. & Eng. R. R. Cas. 474 (qualifying the rule laid down in St. L. & S. E. Ry. *v.* Valirius, 56 Ind. 511); McGinnis *v.* C. S. B. Co., 49 Mich. 466, 8 Am. & Eng. R. R. Cas. 135; Mayes *v.* C. R. I. & P. Ry., 63 Iowa 562, 8 Am. & Eng. R. R. Cas. 527.

³ Manning *v.* B. C. R. & N. R. R., 64 Iowa 240, 15 Am. & Eng. R. R. Cas. 171.

⁴ Ford *v.* F. R. R., 110 Mass. 241; Fuller *v.* Jewett, 80 N. Y. 46; Hough *v.* I. & P. Ry., 100 U. S. 213; P. & N. Y., N. & R. R. Co. *v.* Leslie, 16 Weekly Notes of Cases (Penna.) 321; N. & D. R. R. *v.* Jones, 9 Heisk (Tenn.) 27; C. & P. R. R. *v.* The State, 44 Md. 283; Kirkpatrick *v.* N. Y. C. & H. R. R. R., 79 N. Y. 240; I., B. & W. Ry. *v.* Toy, 91 Ill. 474; T. W. & W. Ry. *v.* Moore, 77 Id. 217; I. C. R. R. *v.* Houck, 72 Id. 285; M. & O. R. R. *v.* Thomas, 42 Ala. 672; Keegan *v.* W. R. R., 8 N. Y. 175; C. & I. C. C. R. R. *v.* Arnold, 31 Ind. 174; Hubgh *v.* N. C. & C. R. T., 6 La. An. 495; S. C. & P. Ry. *v.* Finlayson, 16 Neb. 272, 18 Am. & Eng. R. R. Cas. 68; Murphy *v.* B. & A. R. R., 88 N. Y. 146, 8 Am. & Eng. R. R. Cas. 510; St. L., I. M. & S. Ry. *v.* Harper, 44 Ark. 524.

⁵ I. R. R. *v.* Estes, 96 Ill. 470.

⁶ Hough *v.* T. & P. Ry., 100 U. S. 213.

⁷ K. C., St. J. & C. B. Ry. *v.* Flynn, 78 Mo. 195, 18 Am. & Eng. R. R. Cas. 22.

⁸ Cone *v.* D., L. & W. R. R., 81 N. Y. 207; C. & R. I. R. R. *v.* Rung, 104 Ill. 641, 11 Am. & Eng. R. R. Cas. 218.

⁹ E. T. V. & G. Ry. *v.* Stewart, 13 Lea (Tenn.) 432, 21 Am. & Eng. R. R. Cas. 614.

¹⁰ Whitman *v.* W. & M. R. Ry., 58 Wisc. 408, 12 Am. & Eng. R. R. Cas. 214.

¹¹ Greene *v.* M. & St. L. Ry., 31 Minn. 248, 15 Am. & Eng. R. R. Cas. 214.

¹² Holden *v.* F. R. R., 129 Mass. 268, 2 Am. & Eng. R. R. Cas. 94; Baker *v.* A. V. R. R., 95 Penna. St. 211, 8 Am. & Eng. R. R. Cas. 141; King *v.* N. Y. C. & H. R. R. R., 72 N. Y. 607; Derrenbacher *v.* L. V. R. R., 87 Id. 636, 4 Am. & Eng. R. R. Cas. 624; G., H. & S. A. R. R. *v.* Delahunty, 53 Tex. 206, 4 Am. & Eng. R. R. Cas. 628; K. P. Ry. *v.* Little, 19 Kans. 267; McGowan *v.* St. L. & I. M. R. R., 61 Mo. 528; P. P. Car Co. *v.* Bluhm, 109 Ill. 20, 18 Am. & Eng. R. R. Cas. 87; L. & N. R. R. *v.* Orr, 84 Ind. 50, 8 Am. & Eng. R. R. Cas. 94; Houser *v.* C. R. I. & P. Ry., 60 Iowa 230, 8 Am. & Eng. R. R. Cas. 501.

¹³ Warden *v.* O. C. R. R., 137 Mass. 204, 21 Am. & Eng. R. R. Cas. 612.

hand cars;¹ its passenger and freight cars,² including freight car ladders,³ couplings,⁴ brakes and brake chains,⁵ and check chains,⁶ and its tools.⁷

289. The railway's duty of care as to the construction of its line renders it liable to its servants for injuries caused by the location in dangerous proximity to its line of any structure over which it may rightfully ex-

¹ N. Y., L. E. & W. R. R. v. Powers, 98 N. Y. 274, 21 Am. & Eng. R. R. Cas. 609; C. R. R. v. Kenney, 58 Ga. 485; Kenney v. C. R. R., 61 Id. 590; C. R. R. v. Kenney, 64 Id. 100, 8 Am. & Eng. R. R. Cas. 155; E. T. V. & G. R. R. v. Smith, 9 Lea (Tenn.) 685; I. & G. N. R. R. v. Doyle, 49 Tex. 190; Barringer v. D. & H. C. Co., 19 Hun. 216; Miller v. U. P. Ry., 17 Fed. Rep. 67; S. R. R. v. Jones, 30 Kans. 601, 15 Am. & Eng. R. R. Cas. 201; T. & P. Ry. v. Kane, Tex. , 15 Am. & Eng. R. R. Cas. 218; McQueen v. C. B. U. P. Ry., 30 Kans. 689, 15 Am. & Eng. R. R. Cas. 226; Pool v. C. M. & St. P. Ry., 56 Wisc. 227, 8 Am. & Eng. R. R. Cas. 360; U. T. Co. v. Thomason, 25 Kans. 1, 8 Am. & Eng. R. R. Cas. 589.

² C. B. & Q. R. R. v. Warner, 108 Ill. 538, 18 Am. & Eng. R. R. Cas. 100; M. R. & L. E. R. R. v. Barber, 5 Ohio St. 541; Flannigan v. C. & N. W. Ry., 45 Wisc. 98, 50 Id. 462, 2 Am. & Eng. R. R. Cas. 150.

³ C. & A. R. R. v. Platt, 89 Ill. 141; T., W. & W. Ry. v. Ingraham, 77 Id 309; Ballou v. C. & N. W. Ry., 54 Wisc. 257, 5 Am. & Eng. R. R. Cas. 480; R. & D. R. R. v. Moore, 78 Va. 93, 15 Am. & Eng. R. R. Cas. 239.

⁴ Lawless v. C. R. R., 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; T. & W. R. R. v. Frederick, 71 Ill. 294; Ellis v. N. Y., L. E. & W. R. R., 95 N. Y. 546; A., T. & S. F. R. R. v. Ledbetter, 34 Kans. 326, 21 Am. & Eng. R. R. Cas. 555; H. & T. C. R. R. v. Maddox, Tex. , 21 Am. & Eng. R. R. Cas. 625; A., T. & S. F. R. R. v. Wagner, 33 Kans. 660, 21 Am. & Eng. R. R. Cas. 637.

⁵ Wedgwood v. C. & N. W. R. R., 44 Wisc. 44, 41 Id. 478; Painton v. N. C. Ry., 83 N. Y. 7, 5 Am. & Eng. R. R. Cas. 454; P. & R. R. R. v. Agnew, 11 Weekly Notes of Cases (Penns.) 394; Herbert v. N. P. Ry., Dak. , 8 Am. & Eng. R. R. Cas. 85; Johnson v. R. & D. R. R. 81 N. C. 453; De Graff v. N. Y. C. & H. R. R. R., 76 N. Y. 125; Leahy v. S. P. Ry., Cal. , 15 Am. & Eng. R. R. Cas. 230; Disher v. N. Y. C. & H. R. R. R., 94 N. Y. 622; 15 Am. & Eng. R. R. Cas. 233; Henry v. S. I. Ry., 81 N. Y. 373, 2 Am. & Eng. R. R. Cas. 60; Ransier v. M. & St. L. Ry., 32 Minn. 331, 21 Am. & Eng. R. R. Cas. 601.

⁶ Ladd v. N. V. R. R., 119 Mass. 412.

⁷ P., W. & B. R. R. v. Keenan, 103 Penna. St. 124; Guthrie v. L. & N. R. R., 11 Lea (Tenn.) 372, 15 Am. & Eng. R. R. Cas. 209; Baker v. W. & A. R. R., 68 Ga. 699; C. C. & I. C. Ry. v. Troesch, 68 Ill. 545; Hanrathy v. N. C. Ry., 46 Md. 280.

ercise exclusive control, such as cattle chutes,¹ coal chutes,² bridge supports,³ bridge trusses,⁴ signal posts and telegraph poles,⁵ water tanks,⁶ a station-master's clothes-line post,⁷ mail catchers,⁸ piles of lumber,⁹ and station awnings.¹⁰ But the duty of the railway to its servants does not require it to construct and maintain the bridges, by which highways or other railways are carried over its line, at such a height that its servants can stand erect or move on the tops of its cars without possibility of the collision of their persons with such bridges. The reason of the distinction is that such bridges are not under the exclusive control of the railway whose line passes under them, and the servants of that railway, in entering upon the performance of duties which require them to stand or move upon the tops of its cars while in transit on the line, know that one of the dangers incident to their employment is that of coming in contact with such bridges, and they, therefore, by entering into the service, impliedly undertake to bear that risk, but they do not impliedly undertake to bear the risk of injury from dangerous constructions

¹ *Allen v. B., C., R. & N. Ry.*, 57 Iowa 623, 5 Am. & Eng. R. R. Cas. 620, *Dorsey v. P. & C. C. Co.*, 42 Wisc. 583.

² *A., T. & S. F. R. R. v. Retford*, 18 Kans. 245.

³ *Graham v. N. E. Ry.*, 18 C. B. N. S. 229, 114 E. C. L.

⁴ *W. Ry. v. Elliott*, 98 Ill. 481, 4 Am. & Eng. R. R. Cas. 651.

⁵ *C. & I. R. R. v. Russell*, 91 Ill. 298; *Hall v. U. P. Ry.*, 16 Fed. Rep. 744; *A. & C. A. L. R. R. v. Woodruff*, 63 Ga. 707; *H. & T. Ry. v. Oram*, 49 Tex. 341; *Walsh v. O. Ry. & N. Co.*, 10 Oregon 250; *cf. Lovejoy v. B. & L. R. R.*, 125 Mass. 79.

⁶ *A. & W. P. R. R. v. Webb*, 61 Ga. 586; *A. & C. A. R. R. v. Woodruff*, 65 Id. 707; *H. & T. Ry. v. Oram*, 49 Tex. 341; *Walsh v. O. Ry. & N. Co.*, 10 Oregon 250; *cf. Gould v. C. B. & Q. R. R.*, 66 Iowa 590, 22 Am. & Eng. R. R. Cas. 289.

⁷ *Kearns v. C., M. & St. P. Ry.*, 66 Iowa 599, 22 Am. & Eng. R. R. Cas. 287.

⁸ *C., B. & Q. R. R. v. Gregory*, 58 Ill. 272.

⁹ *Bessex v. C. & N. W. Ry.*, 45 Wisc. 477.

¹⁰ *I. C. R. R. v. Welch*, 52 Ill. 183.

which are under the exclusive control of the railway which employs them.

The railway may assume that cars received from another line for transportation over its line are properly constructed, and it is only bound to make such an inspection of them as the exigencies of traffic permit.

290. The through transportation of passengers and goods over connecting lines without changing cars or breaking bulk frequently requires railways to receive and haul cars from other lines. The railway as a common carrier is bound to receive and haul such cars, but its duty to its servants requires it to subject all such cars to as thorough an inspection as the exigencies of traffic permit, and if that inspection be not made, or if upon such an inspection any such car be found to be faulty in construction or dangerously out of repair, the railway ought to decline to haul it, and if it does undertake to haul it, the railway ought to be liable for any injury to a servant caused thereby. The railway ought not, however, to be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic permit, nor ought it to be held liable for its inspector's negligent performance of his duty, save under those conditions which render a railway liable for the negligence of any servant causing injury to a fellow-servant.¹

¹ Richardson *v.* G. E. Ry., L. R. 10 C. P. 486, 1 C. P. D. 342; Fay *v.* M. & St. L. Ry., 30 Minn. 231, 11 Am. & Eng. R. R. Cas. 193; St. L. & S. E. Ry. *v.* Valirius, 56 Ind. 511; Ballou *v.* C. M. & St. P. Ry., 54 Wisc. 257, 5 Am. & Eng. R. R. Cas. 480; M. C. R. R. *v.* Smithson, 45 Mich. 212, 1 Am. & Eng. R. R. Cas. 101; Gottlieb *v.* N. Y., L. E. & W. R. R., 29 Hun (N. Y.) 637, 100 N. Y. 462; Baldwin *v.* C. R. I. & P. Ry., 50 Iowa 680; Smith *v.* Potter, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140; Mackin *v.* B. & A. R. R., 135 Mass. 201, 15 Am. & Eng. R. R. Cas. 196; L. M. R. R. *v.* Fitzpatrick, 42 Ohio St. 318; T. & P. Ry. *v.* Charlton, 60 Tex. 397, 15 Am. & Eng. R. R. Cas. 350; Kelly *v.* W. C. Ry., Wisc. , 21 Am. & Eng. R. R. Cas. 633; O'Neil *v.*

291. There is not a thorough agreement among the authorities on this subject. Thus, in *L. M. R. R. v. Fitzpatrick*,¹ where the railway was held not to be liable to a servant for injuries resulting from the negligence of its inspector of car repairs, in failing to detect in a car received from another line, a hole which had been burned in the runway on the top of a freight car, and also in failing to discover that its brake wheel was insufficiently fastened, the consequence of which negligence was, that the servant, in walking on the runway in the discharge of his duty, while the car was in motion, saw the burned hole, and, in attempting to avoid it, slipped, and, catching hold of the brake wheel to save himself, it gave way, and he fell between the cars and was hurt, McIlvaine, J., said: "undoubtedly the law requires a railroad company to exercise reasonable care in providing and maintaining safe machinery for the use of its employés engaged in running trains upon its road, but such employer as to such employé is not an insurer of the fitness of its machinery for the purpose for which it was intended. It is bound to vigilance, but vigilance is the maximum of its duty. The successful management of a railroad requires the co-operation of many servants. Reasonable care in the employment of careful and competent servants is required of the company, but the exercise of reasonable care by such servants is at the risk of his fellow-servants. The car alleged to be defective, in this case, as the testimony tends to show, was the car of another company on its way home; but admitting the duty of the company was the same as if it had been its own car, this duty was to

St. L., I. M. & S. R. R., 9 Fed. Rep. 337; *Jetter v. N. Y. & H. R. R.*, 2 Abb. Ct. App. Dec. 458; *Jones v. N. Y. C. & H. R. R. R.*, 28 Hun. 364, 92 N. Y. 628; *Kieth v. N. H. & N. R. R.*, 140 Mass. 175, 23 Am. & Eng. R. R. Cas. 421.

¹ 42 Ohio St. 318, 17 Am. & Eng. R. R. Cas. 578.

employ competent and careful inspectors and repairers. If that were done, its duty to other operatives of the road was performed." So, in *Mackin v. B. & A. R. R.*,¹ upon similiar facts a like result was reached on the ground, as stated by Allen, C. J., that the railway, being bound as a common carrier, to receive from other lines cars for transportation over its lines, its duty to its servants with regard to cars so received, was not that "of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars while in transit, and until ready to be inspected for a new service." Most of the cases cited in the last note agree in their conclusion with the *Fitzpatrick* and the *Mackin* cases. In *Gottleib v. N. Y., L. E. & W. R. R.*,² the railway was held liable to a freight brakeman, who was injured while coupling defective cars which had been received from another railway for transportation over the line, and Earl, J., said, "the defendant was under obligation to its employés to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars and machinery for the discharge of their duties, and upon the assumption that the defendant was responsible for the condition of these cars, as if they were owned by it, there can be but little doubt that the evidence was ample to show that it had failed in its duty to the plaintiff. The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negli-

¹ 135 Mass. 201, 15 Am. & Eng. R. R. Cas. 196.

² 100 N. Y. 462.

gence to put such cars into any train, and especially into a train consisting of cars of different gauge. * * * All the authorities hold that the company drawing the cars of another company over its road owes, in reference to such cars, some duty to its employés. It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars, just as it would inspect its own cars. It owes the duty of inspection as master, and is, at least, responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it, which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars; so much, at least, is due from it to its employés. The employés can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects, the duty of the company is the same as to all cars drawn over its road. The rule imposing this responsibility is not an onerous, or inconvenient, or impracticable one. It requires, before a train starts, and while it is upon its passage, the same inspection and care as to all the cars in the train." The judgment in Gottleib's case was unquestionably right, upon the facts as found by the jury, and the law as laid down by Earl, J., in his judgment, is not in practical effect at variance with that enunciated in the Fitzpatrick and Mackin cases; for in those cases there was negligence in the performance of the inspector's duty; while in the Gottleib case, there was a total failure on the part of the railway to perform the duty of inspection.

292. As the railway owes to its servants the duty of exercising due care with regard to all the instrumentalities

ties of work which it supplies for their use, the fact that another railway has contracted with it to keep in repair the rolling stock which is delivered by that other company for transportation over its line, will not relieve it from its obligation to its own servants to exercise due care as to the safe condition of such rolling stock, and, to that end, of inspecting it.¹

III. THE DUTY OF THE RAILWAY AS TO THE SELECTION AND RETENTION OF SERVANTS.

The duty of the railway to its servants requires the exercise of care in its selection and retention of servants.

293. It is the duty of the railway to its servants to exercise due care in its selection, and retention in service, of their fellow-servants,² and the full performance of this obligation requires, as Harlan, J., said, in *W. Ry. v. McDaniel*,³ the exercise on its part of not simply "the degree of diligence which is customary among those entrusted with the management of railway property, but such, as having respect to the exigencies of the particular service, ought reasonably to be observed," * * * and such as "is fairly commensurate with the perils or dangers likely to be encountered."⁴ In order, therefore, to render the railway liable by reason of its selection or retention of an incompetent servant, it must be shown that the negligence of that servant was the proximate cause of the injury to the plaintiff, and that the officer of the railway, who is charged with the duty of appointing and dismissing servants of that class,

¹ *C. B. & Q. R. R. v. Avery*, 109 Ill. 314, 17 Am. & Eng. R. R. Cas. 649.

² *Moss v. P. R. R.*, 49 Mo. 167; *Frazier v. P. R. R.*, 38 Penna. St. 104; *O'Donnell v. A. V. R. R.*, 59 Penna. St. 239; *Rohback v. P. R. R.*, 43 Mo. 187; *U. P. R. R. v. Milliken*, 8 Kans. 647.

³ 107 U. S. 454.

⁴ See also *A. & F. R. R. v. Waller*, 48 Ala. 459,

either knew, or ought to have known, of the incompetency of the servant.¹ Notice of a fellow-servant's incompetency to the officer performing, upon behalf of the railway, the duty of employing and discharging servants, or selecting them for particular service, is, of course, notice to the railway;² but notice to a fellow-servant is not notice to the railway, as, for instance, notice of a conductor's incapacity to a servant, whose duty it is to call the conductors for service in a designated order, is not notice to the railway of the incompetency of a conductor.³

294. The railway will be liable if it retains in its service a servant whose habits are known to be intemperate;⁴ or an engine-driver who has habitually disobeyed a rule of the railway forbidding the relinquish-

¹ *Paterson v. Wallace*, 1 Macq. H. L. 748; *Brydon v. Stewart*, 2 Id. 30; *Weems v. Mathieson*, 4 Id. 215; *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L.; *H. & B. T. R. R. v. Decker*, 82 Penna. St. 119; 84 Id. 419; *Frazier v. P. R. R.*, 38 Id. 104; *M. C. R. R. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. R. Cas. 230; *Murphy v. St. L. & I. M. Ry.*, 71 Mo. 202; *Moss v. P. R. R.*, 49 Id. 169; *Elliot v. St. L. & I. M. R. R.*, 67 Id. 272; *H. & T. C. Ry. v. Myers*, 55 Tex. 110; *Gilman v. E. Ry.*, 10 Allen 233, 13 Id. 433; *E. T. V. & G. R. R. v. Gurley*, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. R. Cas. 568; *N. O., J. & N. Ry. v. Hughes*, 49 Miss. 258; *Howd v. M. C. R. R.*, 50 Id. 178; *C. R. I. & P. Ry. v. Hoffmann*, 78 Mo. 50, 17 Am. & Eng. R. R. Cas. 625; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140; *M. & O. R. R. v. Taft*, 28 Mich. 289; *Blake v. M. C. R. R.*, 70 Me. 60; *C. R. I. & P. Ry. v. Doyle*, 18 Kans. 58; *Baulec v. N. Y. & H. R. R.*, 59 N. Y. 356; *P. M. & M. R. R. v. Smith*, 59 Ala. 245; *Kersey v. K. C., St. J. & C. B. R. R.*, 79 Mo. 362, 17 Am. & Eng. R. R. Cas. 638.

² *H. & B. T. R. R. v. Decker*, 82 Penna. St. 119, 84 Id. 419; *Frazier v. P. R. R.*, 38 Id. 104; *Patterson v. P. & C. R. R.*, 76 Id. 394; *O. & M. Ry. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. R. Cas. 554; *T. M. R. R. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. R. Cas. 195; *Tyson v. S. & N. A. R. R.*, 61 Ala. 554; *McDermott v. H. & St. J. R. R.*, 73 Mo. 516, 2 Am. & Eng. R. R. Cas. 85; *Laning v. N. Y. C. R. R.*, 49 N. Y. 521; *Mann v. D. & H. C. Co.*, 91 N. Y. 495, 12 Am. & Eng. R. R. Cas. 199.

³ *M. C. R. R. v. Dolan*, 32 Mich. 510.

⁴ *H. & B. T. R. R. v. Decker*, 82 Penna. St. 119, 84 Id. 419; *C. & A. R. R. v. Sullivan*, 63 Ill. 293; *M. C. R. R. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. R. Cas. 230; *Cleghorn v. N. Y. C. & H. R. R. R.*, 56 N. Y. 44; *Chapman v. E. Ry.*, 55 N. Y. 579; *Gilman v. E. R. R.*, 13 Allen 433, 10 Id. 233.

ment of the control of his engine to his fireman.¹ The proof of frequent or continued acts of negligence by a servant, with knowledge thereof brought home to the railway, will fix its liability;² thus, in *Hilts v. C. & G. T. Ry.*,³ the fact that an engine-driver had been drunk on duty three times within a period of nine months, was held to be evidence of negligence on the part of the railway in that its executive officers failed to learn of his dissipated habits, and the railway was held liable to a servant who was killed by being run over by the engine-driver's careless management of the engine at a time when he was intoxicated. But proof of specific acts of negligence by a servant will not establish his incompetency, nor render the railway liable for his retention, unless it be shown that the servant's negligent character either was, or reasonably ought to have been, known to the officer, who, on behalf of the railway, exercised the power of appointing and dismissing such servants;⁴ nor will the fact that an engine-driver is shown to be near-sighted and compelled to use glasses, render the railway negligent if it retains him in the service.⁵

295. The duty of the railway to its servants is not adequately performed, unless care be exercised not only in its original selection of servants, but also in its subsequent organization, discipline, and control of those servants. The action of its servants must be intelligently directed and vigilantly supervised, and, to that end, judicious regulations must be made and enforced

¹ *O. & M. Ry. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. R. Cas. 554.

² *Bailee v. N. Y. & H. R. R.*, 59 N. Y. 356; *Mann v. D. & H. C. Co.*, 91 Id. 495, 12 Am. & Eng. R. R. Cas. 199.

³ 55 Mich. 437, 17 Am. & Eng. R. R. Cas. 623.

⁴ *C. R. I. & P. Ry. v. Huffmann*, 78 Mo. 50, 17 Am. & Eng. R. R. Cas. 625; *Corson v. M. C. R. R.*, 76 Me 244, 17 Am. & Eng. R. R. Cas. 634; *Cooper v. M. & P. R. R.*, 23 Wisc. 668; *P. F. W. & C. R. R. v. Ruby*, 38 Ind. 294; *Harper v. I. & St. L. R. R.*, 44 Mo. 488.

⁵ *T. & P. Ry. v. Harrington*, 62 Tex. 597, 21 Am. & Eng. R. R. Cas. 571.

for the government of its servants in the discharge of their duties; those servants must be adequately paid; they must be promoted, or otherwise rewarded, when they merit special commendation for meritorious service; they must be promptly punished when they fall short of a full and faithful performance of duty; and they must be unhesitatingly dismissed when their incompetency has been proven.

IV. THE DUTY OF RAILWAYS TO THEIR SERVANTS IN THE OPERATION OF THE LINE.

The duty of the railway to its servants requires the exercise of care in its operation of its line.

296. It is the duty of railways to make regulations for the safety of their servants, and to use all reasonable means for the enforcement of those regulations,¹ but a railway is not liable to an injured servant merely because his fellow-servants have disobeyed such regulations.² A railway is, however, liable if it permits its servants to habitually disregard regulations, whose enforcement is necessary to the safety of other servants, as where a servant is injured by the careless handling of an engine by a fireman, it being proven that the engine-driver, in disobedience of the regulations of the railway, was to the knowledge of his superior officers in the habit of surrendering the control of his engine to the fireman.³ A railway is not negligent to its servants if it varies from its regular time-table in running its trains, pro-

¹ Vose *v.* L. & Y. Ry., 2 H. & N. 728; Slater *v.* Jewett, 85 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515; Rose *v.* B. & A. R. R., 58 N. Y. 217; Cooper *v.* C. R. R., 44 Iowa 134; P., F. W. & C. Ry. *v.* Powers, 74 Ill. 341; L. S. & M. S. Ry. *v.* Lavallee, 36 Ohio St. 221, 5 Am. & Eng. R. R. Cas. 549.

² Rose *v.* B. & A. R. R., 58 N. Y. 217.

³ O. & M. Ry. *v.* Collarn, 73 Ind. 261, 5 Am. & Eng. R. R. Cas. 554; Connor *v.* C. R. I. & P. Ry., 59 Mo. 285.

vided that it gives to its servants reasonable notice of any change, which if unknown to them, may endanger their safety;¹ but where on a single track line a special train is ordered to run when a regular train is due, and, no effort having been made to hold the regular train, a collision ensues and a servant is injured, the railway is liable, for the negligence of its superintendent is its negligence.² So also, where a construction train is allowed to stand on the line in a curved cutting at a time when a regular train is due, no notice being given to the engine-driver or conductor of the regular train that they may expect to find the construction train in their way, and through the failure of a labourer to properly signal the regular train, a collision having ensued and a servant on the construction train having been injured, the railway was held liable therefor.³ So in *McLeod v. Ginther*,⁴ the railway was held liable to a servant injured in a collision which resulted from the negligence of a telegraph operator in so writing out an order for the movement of a train on a single track line as to convey to the mind of a train conductor the idea that he might safely occupy the line for a longer time than that time which the order was intended to give him.

297. It is the duty of the railway not to increase the perils of its servants by the inadequacy of the force employed in any particular work, and, in particular, trains must be manned by a sufficient number of train hands;⁵ but a railway is not negligent to its labourers

¹ *Slater v. Jewett*, 85 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515.

² *Sheehan v. N. Y. C. & H. R. R.*, 91 N. Y. 332, 12 Am. & Eng. R. R. Cas. 235.

³ *P. C. & St. L. Ry. v. Henderson*, Ohio St. , 5 Am. & Eng. R. R. Cas. 529.

⁴ 80 Ky. 399, 8 Am. & Eng. R. R. Cas. 162, 15 Id. 291

⁵ *Flike v. B. & A. R. R.*, 53 N. Y. 549; *Booth v. B. & A. R. R.*, 73 Id. 38; *C. & E. I. R. R. v. Geary*, 110 Ill. 383, 1^o Am. & Eng. R. R. Cas. 606;

if it fails to put a conductor in charge of a dirt train.¹

298. The fact that a train is run at a rate of speed in excess of that prohibited by statute is not necessarily negligence as to servants of the railway on the train,² and apart from statutory regulation no rate of speed is *per se* negligent,³ but the circumstances of the particular case, such as the approach to a level crossing, or the proximity to a city, town, or village, or the defective condition of the line, may render that rate of speed negligent which, under other circumstances, as, for instance, on a straight line in good order in the open country or so fenced that neither trespassing human beings nor animals can come upon it, would not be negligent.⁴ The running of a train at a high rate of speed past a way station is not *per se* unlawful, and is not negligence as to servants engaged in work on the station platform,⁵ yet, in *Crowley v. B., C., R. & N. R. R.*,⁶ where a labourer while clearing away snow in a railway yard was injured by being struck by a train moving at a rate of speed in excess of that permitted by municipal ordinance within the city limits, the railway was held liable.

299. A railway is negligent to those servants whose duty requires them to walk on its line, or in its yards, if it moves engines or trains at night without a head-

B. & O. R. R. v. State, 41 Md. 268; C. & N. W. Ry. v. Donahue, 75 Ill. 106; Skip v. E. C. Ry., 9 Ex. 223; Harvey v. N. Y. C. & H. R. R. R., 88 N. Y. 481, 8 Am. & Eng. R. R. Cas. 515; cf. Besel v. N. Y. C. & H. R. R. R., 70 N. Y. 171, reversing the judgment of the lower court as reported in 9 Hun 457.

¹ Henry v. S. I. Ry., 81 N. Y. 373.

² Dowell v. V. & M. R. R., 61 Miss. 519, 18 Am. & Eng. R. R. Cas. 42; Lockwood v. C. & N. W. Ry., 51 Wisc. 50, 6 Am. & Eng. R. R. Cas. 151.

³ Wallace v. St. L., I. M. & S. Ry., 74 Mo. 594.

⁴ C. R. I. & P. Ry. v. Huffmann, 78 Mo. 50, 17 Am. & Eng. R. R. Cas. 625.

⁵ Muster v. C. St. P. & M. Ry., 61 Wisc. 325, 18 Am. & Eng. R. R. Cas. 113.

⁶ 65 Iowa 658, 18 Am. & Eng. R. R. Cas. 56.

light;¹ but the reversal of an engine in making up, or switching, trains is not negligence on the part of the railway;² nor does the railway's duty to its train hands engaged on moving trains require it to notify them before bringing the train to a sudden stop in order to avoid a collision with trespassing cattle on the line.³ The railway is liable to its servants for injuries caused by collision with obstructions on the line which it has been negligent in not discovering and removing.⁴ Nevertheless, as is hereinafter stated, the servant takes upon himself the risk of injury from the ordinary conduct of the business, including the negligence of his fellow-servants, and the railway is only liable for such injuries as result from the non-performance of its duty to him.

V. THE LIABILITY OF RAILWAYS TO THEIR SERVANTS FOR THE NEGLIGENCE OF OTHER SERVANTS.

300. A master is liable to his servants for injuries caused by his negligence while personally participating with them in the work.⁵ On the same principle, where the master, by his personal interference in the conduct of a work whose performance with safety to a servant requires extraordinary care on the part of that servant, urges the servant to a degree of speed which compels him to neglect precautions which he would otherwise take, such conduct on the part of the servant is not contributory negligence.⁶ Railway corporations being

¹ *Burling v. I. C. R. R.*, 85 Ill. 18; *C. & N. W. Ry. v. Taylor*, 69 Id. 461.

² *Jackson v. K. C., L. & S. K. R. R.*, 31 Kans. 761, 15 Am. & Eng. R. R. Cas. 178.

³ *M. P. Ry. v. Haley*, 25 Kans. 35, 5 Am. & Eng. R. R. Cas. 594.

⁴ *Wilson v. D., S. P. & P. Ry.*, 7 Colo. 101, 15 Am. & Eng. R. R. Cas. 192.

⁵ *Ashworth v. Stanwix*, 3 El. & El. 701, 107 E. C. L.; *Roberts v. Smith*, 2 H. & N. 213; *Mellors v. Shaw*, 1 B. & S. 446, 101 E. C. L.

⁶ *Lee v. Woolsey*, 16 Weekly Notes of Cases (Penn.) 337.

artificial beings and creatures of law, cannot render themselves liable by any personal participation in their servants' work, but they are, of course, liable to those servants for the negligence of their fellow-servants wherever individual masters would be liable for the negligence of such servants, and the corporate character of railways neither increases nor diminishes their liability in that respect.

301. The master being liable if his own negligence in his personal participation with his servant in the work be the cause of injury to the servant, it would seem that the master ought to be equally liable if the cause of injury to the servant be the negligence of a person whom the master has placed in such a position that he can fairly be considered as the master's representative, with power to conduct the business in the exercise of an uncontrolled discretion. That the master would be liable in such a case was tacitly admitted in *Murphy v. Smith*,¹ and in *Feltham v. England*,² and expressly ruled in *Grizzle v. Frost*;³ and the doctrine of these cases is supported by many American cases.⁴ On the other hand, in *Wilson v. Merry*,⁵ where it was held that the operators of a mine were not responsible for the death of a miner caused by an interruption of the free ventilation of the mine and a consequent explosion of fire-damp, resulting from the erection of a scaffolding by the manager of the mine, Lord Cairns said: "what the master is, in my opinion, bound to his servants to do, in the event of his not personally super-

¹ 19 C. B. N. S. 361, 115 E. C. L.

² L. R. 2 Q. B. 33.

³ 3 F. & F. 622.

⁴ It is sufficient to cite *Coreoran v. Holbrook*, 59 N. Y. 517; *Mullan v. P. & S. M. S. S. Co.*, 78 Penna. St. 25, as construed in *L. V. Coal Co. v. Jones*, 86 Id. 441, and in *D. & H. Canal Co. v. Carroll*, 89 Id. 374; *Mann. v. D. & H. C. Co.*, 91 N. Y. 500; *Pantzor v. T. F. I. M. Co.*, 99 N. Y. 368.

⁵ L. R. 1 Sc. & Div. 326.

intending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master." In *Tarrant v. Webb*,¹ Jervis, C. J., put the same view tersely, saying: "the master *may* be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons. He is not bound to warrant their competency." In *Howells v. L. S. Steel Co.*,² where a mine, in obedience to statutory provisions, having been put by its owner under the "control" of a manager, and a miner having been killed by the negligence of that manager in failing to withdraw the miners when the mine was invaded by noxious gases, it was held that the master, the operator of the mine, was not liable for the death so caused, Cockburn, C. J., saying: "since the case of *Wilson v. Merry*, it is not open to dispute that in general the master is not liable to a servant for the negligence of a fellow-servant, although he be the manager of the concern." It is the clear result of these cases that in England masters are not to be held liable to their servants for the personal negligence of vice-principals.³

302. The general rule in the United States is that which is stated by Allen, J., in *Malone v. Hathaway*,⁴ in these terms: "when the servant, by whose acts of negligence, or want of skill, other servants of the common employer have received injury, is the *alter ego* of the master to whom the employer has left everything, reserving to himself no discretion, then the middle-man's

¹ 18 C. B. 804, 86 E. C. L.

² L. R. 10 Q. B. 62.

³ See also *D. & H. Canal Co. v. Carroll*, 89 Penna. St. 374.

⁴ 64 N. Y. 5.

negligence is the negligence of the employer, for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. * * * * When the middle-man, or superior servant, employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care." In *L. V. Coal Co. v. Jones*,¹ *Mercur*, C. J., uses nearly identical language, saying: "where the master has placed the entire charge of the business in the hands of an agent, exercising no authority and no superintendence of his own therein, he may be liable for the negligence of such an agent to a subordinate employé." Under all the American cases a servant to whom so extensive an authority had been delegated would be held to be a vice-principal, but in many of the cases a much more limited delegation of authority is held to constitute the person entrusted therewith a vice-principal. The test in some of the cases is the grant to a servant of the power of appointing and discharging subordinate servants, and as to such subordinates the servant invested with that power is held to be a vice-principal.² A more logical test is to be found in the grant to a servant of that discretionary and supervisory power in the administration of a railway which is necessarily exercised by the controlling authority of the rail-

¹ 86 Penna. St. 439.

² *Mullan v. P. & S. M. S. S. Co.*, 78 Penna. St. 25; *Smith v. S. C. & P. R. R.*, 15 Neb. 583, 17 Am. & Eng. R. R. Cas. 561; *Flike v. B. & A. R. R.*, 53 N. Y. 549; *McKune v. C. S. R. R.*, Cal. , 17 Am. & Eng. R. R. Cas. 589; *C. & A. Ry. v. May*, 108 Ill. 288, 15 Am. & Eng. R. R. Cas. 320.

way, or by some agent to whom it has been specially delegated.

303. If this test be applied, it will be found that the executive officers, who direct and control the operation of the line, or of any integral portion of it, and who appoint and select subordinate servants, are vice-principals, and that foremen of gangs, yard-masters, station-agents, engine-drivers, and conductors of trains, are not vice-principals, but merely fellow-servants of the servants who serve under them. Upon this principle, a train-dispatcher has been held to be a vice-principal.¹

304. A foreman is merely a superior servant, and he cannot properly be regarded as an *alter ego* of his master. Nevertheless, in some cases, it is held that foremen are vice-principals.² On the other hand, it is held in other cases, that a foreman is not a vice-principal;³

¹ *McKinne v. C. S. R. R.*, Cal. ., 21 Am. & Eng. R. R. Cas. 539; *Darri-gan v. N. Y. & N. E. R. R.*, 52 Conn. 285, 23 Am. & Eng. R. R. Cas. 438; *Phillips v. C. M. & St. P. Ry.*, 64 Wisc. 475, 23 Am. & Eng. R. R. Cas. 453.

² *L. & N. R. R. v. Bowler*, 9 Heisk. 866; *L. M. R. R. v. Stevens*, 20 Ohio 416; *P. F. W. & C. Ry. v. Lewis*, 31 Ohio St. 196; *L. S. & M. S. Ry. v. Lavalley*, 36 Id. 221, 5 Am. & Eng. R. R. Cas. 549; *Smith v. S. C. & P. Ry.*, 15 Neb. 583, 18 Am. & Eng. R. R. Cas. 561; *Cowles v. R. & D. R. R.*, 84 N. C. 309; *Ragsdale v. M. & C. R. R.*, 3 Baxter (Tenn.) 426; *L. C. & L. R. R. v. Cavens*, 9 Bush (Ky.) 559; *Gilmore v. N. P. Ry.*, 18 Fed. Rep. 866, 15 Am. & Eng. R. R. Cas. 304; *Dobbin v. R. & D. R. R.*, 81 N. C. 446.

³ *Lovegrove v. L. B. & S. C. Ry.*; *Gallagher v. Piper*, 16 C. B. N. S. 669, 111 E. C. L.; *Feltham v. England*, L. R. 2 Q. B. 33, 7 B. & S. 676; *Wigmore v. Jay*, 5 Ex. 354; *Wright v. N. Y. C. R. R.*, 25 N. Y. 565; *Keystone Bridge Co. v. Newberry*, 96 Penna. St. 246; *Brick v. R. N. Y. & P. R. R.*, 98 N. Y. 212; *L. V. Coal Co. v. Jones*, 86 Penna. St. 441; *Weger v. P. R. R.*, 55 Id. 460; *Caldwell v. Brown*, 53 Id. 453; *D. & H. C. Co. v. Carroll*, 89 Id. 374; *Coon v. S. & U. R. R.*, 5 N. Y. 492; *Willis v. O. Ry. & N. Co.*, 11 Oregon 257, 17 Am. & Eng. R. R. Cas. 539; *Peschel v. C. M. & St. P. Ry.*, 62 Wisc. 338, 17 Am. & Eng. R. R. Cas. 545; *Marshall v. Stricker*, 63 Mo. 308; *Gowan v. St. L. & I. M. R. R.*, 61 Id. 528; *Rains v. St. L. I. M. & S. Ry.*, 71 Id. 164, 5 Am. & Eng. R. R. Cas. 610; *Shauck v. N. C. R. R.*, 25 Md. 462; *Thayer v. St. L. A. & T. H. R. R.*, 22 Ind. 26; *Fraker v. St. P., M. & M. Ry.*, 32 Minn. 54, 15 Am. & Eng. R. R. Cas. 256; *Copper v. L. E. & St. L. Ry.*, Ind. 22 Am. & Eng. R. R. Cas. 277.

thus, in *Feltham v. England*,¹ the defendant was a maker of locomotive engines, and the plaintiff was a workman in his service; while an engine was being hoisted on a travelling crane resting on brick piers, the plaintiff, under the directions of the defendant's foreman or manager, having gotten on the engine, was injured by its fall, resulting from the giving way of the piers. After a verdict for the plaintiff a rule to enter a nonsuit was made absolute, Mellor, J., saying, "the master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority."

305. In some of the cases it is held that the conductors of trains are vice-principals, as to the engine-drivers, firemen or stokers, and train hands or guards, of their trains;² thus, in *C. C. & C. Ry. v. Keary*,³ where a railway was held liable to a train hand for injuries caused by the negligence of the conductor of his train, Ranney, J., suggests the following reasons for the conclusion to which the court came, "that the principal is, by anything incident to the contract of service, released from his obligation to everybody to superintend and control the business with care and prudence, so as to prevent injury, we think wholly unsupported by reason, and, as yet, nearly so, by authority. For this purpose (*i. e.*, to superintend and control with skill and care the dangerous force exerted), the conductor is employed, and, in this, he directly represents the company. They contract for and engage his care and skill. They

¹ L. R. 2 Q. B. 33.

² *C. C. & C. Ry. v. Keary*, 3 Ohio St. 254; *L. M. R. R. v. Stevens*, 20 Ohio 415; *C. M. & St. P. Ry. v. Ross*, 112 U. S. 377; *Moon v. R. & A. R. R.*, 78 Va. 745, 17 Am. & Eng. R. R. Cas. 531; *Cowles v. R. & D. R. R.*, 84 N. C. 309 2 Am. & Eng. R. R. Cas. 90.

³ 3 Ohio St. 254.

commission him to exercise that dominion over the operations of the train, which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation ; and no servants are fellow-servants when one is placed in control over the other. * * * It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. * * * But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences." So, in *C., M. & St. P. Ry. v. Ross*,¹ the plaintiff, an engine-driver in the defendant's employment, was injured in a collision on a single track line, caused by the neglect of the conductor of his train to communicate to him a telegraphic order received by the conductor from the train-dispatcher, directing the train to pass another train at a certain siding. Judgment upon a verdict for the plaintiff was affirmed in an opin-

ion delivered by Field, J., and concurred in by Waite, C. J., and by Miller, Harlan, and Woods, JJ., but dissented from by Bradley, Matthews, Gray, and Blatchford, JJ. The ground of decision, as stated by Field, J., is, that "the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company," and, therefore, his negligence is the negligence of the company. These cases are obviously open to criticism. The judgments therein seem to be based on a misunderstanding of the practical method of railway operations. It is far from accurate to say, as Ranney, J., said of a railway conductor in *C. C. & C. Ry. v. Keary*,¹ "his will alone controls everything," or to assume, as Field, J., assumes, in *C. M. & St. P. Ry. v. Ross*,² that such an official "commands its" (the train's) "movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it." In fact, the negligence on the part of the conductor, which was the subject of complaint in that case, was, not that he had improperly exercised a discretion vested in him, but that he had failed to show to the engine-driver, and on his own part to obey, an express order from his superior officer, the train-dispatcher, commanding the train to wait at a particular station until the arrival of a certain other train. The facts upon which the plaintiff's claim was founded, therefore, negative the theory upon which the railway was held liable. As Folger, C. J., said, in *Slater v. Jewett*,³ courts may well take judicial notice of the fact that "the

¹ 3 Ohio St. 254.

² 112 U. S. 395.

³ 84 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515.

great railways of the land are managed in the every-day practical running of them, by over-looking officers at distant places, who use the telegraph wires to keep all the while informed where trains are, and to direct their movements from hour to hour." In railway practice a conductor cannot run his train as a master sails his ship. No discretion is vested in him. The time-table, as arranged by his superior officers, prescribes the point and hour of departure of the train, the time at which it is to pass each station on its way, its place and hour of final stoppage, and fixes, by necessary implication, its speed between the several stations. The conductor is bound, in the running of his train, to rigidly adhere to that time-table, unless otherwise directed by a special order from competent authority. So far, therefore, from being a vice-principal, or an executive officer to whom is delegated, in the words of Ranney, J., "that dominion over the operations of the train which essentially pertains to the prerogatives of the owner," a conductor is merely the foreman of the hands employed on the train, and, as such, he is their fellow-servant. That conductors of trains are not vice-principals, but fellow-servants, as to the engine-drivers, firemen or stokers, and train hands or guards of their trains, is held in two well-reasoned Wisconsin cases.¹

306. It is held in some cases that an engine-driver is a vice-principal as to his fireman or stoker, and as to train-hands and labourers. Thus, in *L. & N. R. R. v. Collins*,² Robertson, C. J., said, that "in the use and control of the engine, the engineer acts as the representative agent of the common superior—the corpora-

¹ *Heine v. C. & N. W. Ry.*, 58 Wisc. 528; *Pease v. C. & N. W. Ry.*, 61 Id. 163, 17 Am. & Eng. R. R. Cas. 527.

² 2 Duvall 114.

tion." This view is as unsound in theory as it is unsupported by other respectable authority.

307. It is obvious that the servant, whose negligence has caused the injury, may in the discharge of one class of duties act as a vice-principal, and in the discharge of another class of duties he may be only a fellow-servant. The liability of the railway to the injured servant will then be dependent upon the character of the duty whose non-performance by the negligent servant was the cause of the injury.¹

308. It is clear that that negligence of a servant, which is the cause of injury to another servant of a common master, must consist either in his carelessness while personally participating with that other servant in the work of their common master, or in his failure to perform a duty to the injured servant which the implied contract of service has devolved upon their master, and the performance of which duty the master has delegated to him, such as the exercise of due care in either the provision and maintenance in repair of the instrumentalities of labour, or in the selection and retention in service of the injured servant's fellow-servants. If the servant's negligence be of the former character, the railway ought not to be held liable therefor, if due care has been exercised in the selection and retention in service of the negligent servant, and if that negligent servant be not a vice-principal, for, as is shown in a subsequent section, every servant impliedly undertakes to bear the risk of the negligence of those fellow-servants, in whose selection or retention in service the master has not been negligent. If, however, the negligence be of the latter character, whatever be the rank of the negligent servant, or the degree of authority

¹ *Brick v. R., N. Y. & P. Ry.*, 98 N. Y. 212; *Crispin v. Babbitt*, 81 Id. 516; *McCosker v. L. I. R. R.*, 84 Id. 77.

vested in him, the master ought to be held liable, upon the principle stated by Blackburn, J., in *The Mersey Docks Trustees v. Gibbs*,¹ that "the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and it is quite immaterial whether the actual actors are servants or not." In this connection, also, it may well be remembered that Byles, J., said, with great force, in his judgment in the Exchequer Chamber in *Clarke v. Holmes*,² that "if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business, and abandons it to others, the less will he be liable." The true rule, therefore, is that "no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance."³

309. Upon this principle it has been held in many cases, that, as it is the duty of the railway to its servants to take due care that its line,⁴ rolling stock, machinery, and appliances⁵ are in a safe condition for

¹ L. R. 1 H. L. 115.

² 7 H. & N. 949.

³ *Mann v. D. & H. C. Co.*, 91 N. Y. 500; *Booth v. B. & A. R. R.*, 73 N. Y. 40; *Pantzar v. T. F. I. Co.*, 99 N. Y. 368; *Benzing v. Steinway*, 101 N. Y. 547.

⁴ *Drymala v. Thompson*, 26 Minn. 40; *Lewis v. St. L. & I. M. Ry.*, 59 Mo. 495; *Hall v. M. P. Ry.*, 74 Id. 298; *C. C. R. R. v. Ogden*, 3 Colo. 499; *Porter v. H. & St. J. R. R.*, 71 Mo. 66, 2 Am. & Eng. R. R. Cas. 44.

⁵ *Hough v. T. & P. Ry.*, 100 U. S. 213; *Fuller v. Jewett*, 80 N. Y. 46; *Ford v. F. R. R.*, 110 Mass. 241; *P. & N. Y. C. R. R. v. Leslie*, 16 Weekly Notes of Cases (Penna.) 321; *C. B. & Q. R. R. v. Avery*, 109 Ill. 314, 17 Am. & Eng. R. R. Cas. 649; *H. & T. C. Ry. v. Mareilles*, 59 Tex. 334, 12 Am. & Eng. R. R. Cas. 231; *C. & N. W. Ry. v. Jackson*, 53 Ill. 492; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Gunter v. G. Mfg. Co.*, 18 S. C. 262; *A. T. & S. F. Ry. v. Moore*, 29 Kans. 632, 11 Am. & Eng. R. R. Cas. 243, 31 Kans. 197, 15 Am. & Eng. R. R. Cas. 312; *Gilmore v. U. P. Ry.*, 18 Fed. Rep. 866, 15 Am. & Eng. R. R. Cas. 304; *Lawless v. C. R. R. R.*, 136 Mass. 1, 18 Am. & Eng.

operation, and to take due care that its servants' fellow-servants are selected with care;¹ the omission to exercise that care in either respect necessarily fixes the liability of the railway, whatever be the rank of the servant to whom the railway has delegated the performance of that duty. It follows that the duty of inspection being a duty whose performance is incumbent on the railway, the railway is liable where that duty is neglected or carelessly performed by the servant to whom it has been entrusted;² thus, in *Hough v. T. & P. Ry.*,³ where the railway was held liable for the death of an engine-driver caused by the defective condition of the engine, which was due to the negligence of those servants of the railway, who were charged with the duty of inspecting and directing the repairs of engines, Harlan, J., said (p. 218): "a railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business in

R. R. Cas. 96; *T., W. & W. Ry. v. Ingraham*, 77 Ill. 309; *Davis v. C. V. R. R.*, 55 Vt. 84, 11 Am. & Eng. R. R. Cas. 173; *Ryan v. C. & N. W. Ry.*, 60 Ill. 171.

¹ *Laning v. N. Y. C. R. R.*, 49 N. Y. 521; *H. & B. T. R. R. v. Decker*, 82 Penna. St. 119, 84 Id. 419; *Frazier v. P. R. R.*, 38 Id. 104; *Patterson v. P. & C. R. R.*, 76 Id. 394; *O. & M. Ry. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. R. Cas. 554; *T. M. R. R. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. R. Cas. 195; *Tyson v. S. & N. A. R. R.*, 61 Ala. 554; *McDermott v. H. & St. J. R. R.*, 73 Mo. 516, 2 Am. & Eng. R. R. Cas. 85; *Flike v. B. & A. R. R.*, 53 N. Y. 549; *Booth v. B. & A. R. R.*, 73 N. Y. 38.

² *Durkin v. Sharp*, 88 N. Y. 225, 8 Am. & Eng. R. R. Cas. 520; *Kain v. Smith*, 80 N. Y. 458, 2 Am. & Eng. R. R. Cas. 545; *Fay v. M. & St. L. Ry.*, 30 Minn. 231, 11 Am. & Eng. R. R. Cas. 193; *Drymala v. Thompson*, 26 Minn. 40; *Long v. P. R. R.*, 65 Mo. 225; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 368; *Cooper v. P. C. & St. L. R. R.*, 24 W. Va. 37, 21 Am. & Eng. R. R. Cas. 564, note; *Schultz v. Ry.*, 48 Wisc. 375; *M. P. Ry. v. Condon*, 78 Mo. 567, 17 Am. & Eng. R. R. Cas. 583; *Long v. P. Ry.*, 65 Mo. 225; *King v. M. Ry.*, 14 Fed. Rep. 277, 8 Am. & Eng. R. R. Cas. 119; *Brann v. C. R. I. & P. Ry.*, 53 Iowa 595; *Tierney v. M. & St. L. Ry.*, 21 Am. & Eng. R. R. Cas. 545.

³ 100 U. S. 213.

all of its departments are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employés, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation. To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés." So in *N. P. R. R. v. Herbert*,¹ where the railway was held liable to a yard hand for injuries caused by the negligently defective condition of the brake, draw-bar, and bumper

¹ 116 U. S. 642.

of a car, Field, J., said: "it is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability." So in *Mann v. D. & H. C. Co.*,¹ where the railway was held liable for the negligence of a freight conductor, who, in selecting at the request of the yardmaster at a way station, from his train hands, the one who was to signal and stop an approaching train, made choice of one Townsend, a young and inexperienced servant who had only once before flagged a train at night, and who had on that occasion so negligently performed the duty that he was then discharged from the service, but subsequently reinstated, Andrews, J., said: "it would be unreasonable that the master should confer upon a subordinate the power to select a man for so important a duty as that entrusted to Townsend, and be exonerated from responsibility on the ground that the subordinate was negligent in its performance."

310. On the other hand, in *Wigmore v. Jay*,² which was decided in 1850, the plaintiff's decedent, a brick-layer in the employment of the defendant, a master builder, was killed by the fall of a scaffolding resulting from the unsoundness of a pole, whose unsoundness had been brought to the notice of the defendant's foreman, but the defendant took no part in the erection of the

¹ 91 N. Y. 495, 12 Am. & Eng. R. R. Cas. 199.

² 5 Exch. 354.

scaffolding, and the unsoundness of the pole was not brought to his notice. At the trial Pollock, C. B., directed a verdict for the defendant, on the ground that as the defendant had not personally attended to the erection of the scaffold, the action could not be maintained, and a rule for a new trial was refused. So in *Gallagher v. Piper*,¹ where the plaintiff being employed in constructing a scaffolding for a building which the defendants, who were builders, were engaged in erecting, and having unavailingly applied for more boards to Phear, the defendants' "general foreman or manager," was injured in falling from the scaffold, which was insufficient and unsafe to the knowledge of Phear, but not to the knowledge of the defendants, who did not personally interfere with the work; after a verdict for the plaintiff a rule for a new trial was made absolute. Erle, C. J., and Wiles, J., held that *Wigmore v. Jay*,² was a conclusive authority for holding Phear to be a fellow-servant. Williams, J., said: "the doubt I entertain is whether Phear was not rather a sort of deputy-master than a fellow-workman of the plaintiff, so that a notice of the insufficiency of the materials to him would be notice to the defendants themselves. Looking, however, at the evidence here I do not find enough to warrant the conclusion that Phear was intended to stand in the place of the defendants, so as to bind them by his acts or omissions in this respect." Willes, J., said: "it is true he (Phear) filled a superior position, but still he was a servant, and I am unable to draw any distinction, in this respect, between one description of servant and another, so long as that relation of master and servant exists, and the party injured and the person whose negligence caused the injury are employed under one common master. If this had been the case of a person,

¹ 16 C. B. N. S. 669, 111 E. C. L.

² 5 Exch. 354.

who might be said to have authority to act for the master as a kind of universal agent, I should have been prepared to consider the suggestions thrown out by my brother Byles in his judgment in *Clarke v. Holmes*, and see whether he could come within the denomination of servant at all. But, before I could bring myself to say that such an agent did not come within the rule, I should take time to look into the subject, and especially to consider the position of that most authoritative of all agents, the master of a ship. I should like to consider whether, if the master of a ship, without the knowledge of his owners, were to start from an intermediate port with the vessel in a damaged and unseaworthy condition, and he was in consequence driven on shore or upon a rock and some of the crew thereby sustained personal injury, it would be just or reasonable to hold the owners to be liable to the sailors as they would undoubtedly be to third persons. But it is unnecessary to discuss that here, for it is plain that Phear was as much a servant of the defendants as was any one of the labourers employed under his direction and control." Byles, J., said, in his dissenting judgment: "he (Phear) was not merely the foreman or manager *pro hac vice*, but had been the general manager of the defendants' works for many years, about twenty-four or twenty-five years. He had the entire management of the men employed under him, engaging them and dismissing them as he thought fit. * * * He was acting-master. At all events, there was evidence for the jury that such was his position. Take the case of a large builder, who is never seen near his work, but who trusts the entire conduct of his business to a foreman or manager, who is eyes, ears, tongue, brains, and everything to him. Is not the master liable for acts of negligence of his employé (for I will not use the term 'servant,' which, like that of

'foreman,' is susceptible of many meanings), whilst acting thus for him? If these defendants had been a corporation aggregate they must have employed somebody to represent them. Take the case of a railway company employing a general traffic manager, and through his negligence an accident happens to a servant of the company—is it to be said that the party injured is without remedy because the corporation is incapable of personal misconduct? If the rule relied on be found so inconvenient that it cannot be applied to a case like that, ought it to be applied here? That depends very much on the position of Phear. If he had been a servant, though a superior one, I should have entertained some doubt, but I do not think he stood in the position of a servant at all. He stood rather in the position of a general agent for the defendants. It is true he was called the foreman, but that is a word the meaning of which is extremely various. The case of *Wigmore v. Jay* is distinguishable in this, that there it does not appear that the person whose negligence caused the accident was anything more than foreman for the particular work." The judgments of the House of Lords in *Wilson v. Merry*, and of the Common Pleas in *Tarrant v. Webb*, have been referred to in section 299. The English rule is adopted in some American cases in which it is held that inspectors of car repairs are fellow-servants of train hands, and that railways are not liable for injuries caused by the negligence of such inspectors.¹

311. Briefly stated, the doctrine of the English cases amounts to this, that the master impliedly contracts, not that he will personally provide the instrumentalities

¹ C. & X. R. R. *v. Webb*, 12 Ohio St. 475; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140; *L. M. R. R. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. R. R. Cas. 578; *Mackin v. B. & A. R. R.*, 135 Mass. 301, 15 Am. & Eng. R. R. Cas. 196; *N., C. & St. L. Ry. v. Foster*, Tenn. , 11 Am. & Eng. R. R. Cas. 180; *Gibson v. N. C. Ry.*, 22 Hun 289.

ties of the servant's work, but that he will not be negligent in his selection or retention of the servants whom he charges with that duty, and that, therefore, on the basis of that implied contract, a servant necessarily assumes as a risk incident to his employment, not only the danger of injury from the negligence of those fellow-servants with whom he is, either remotely or nearly, associated in the performance of his work, but also, and equally, the danger of injury from the negligence of those fellow-servants whom the master has charged with the duty of supplying and maintaining in repair the instrumentalities of the work. On the other hand, the doctrine of the American cases is, that the exercise of care in the construction, inspection, and maintenance in repair of the instrumentalities of labour, is, by the implied contract of a service, imposed upon the master as a duty, and that, therefore, the non-performance of the duty renders him liable for such injuries as may result from that non-performance. The point of divergence in the cases is, therefore, in their differing conception of the master's implied contract, and the difficulty in accepting the view laid down in the English cases is, that they limit the master's duty of exercising care in the provision and maintenance in repair of the instrumentalities of labour, and in the selection of fellow-servants, to the mere exercise of care in the selection of the servant to whom the master delegates that duty; whereas, the duty being incumbent upon the master, its non-performance ought, in justice, to fix his liability, without reference to the character of the agency to whom he may delegate the performance of the duty.

312. Nevertheless, in the consideration of this subject, it must be borne in mind, that, under the American rule, the railway does not guarantee to its servants

the soundness of the appliances of labour which it furnishes to those servants, or the infallibility of its inspection of those appliances, or the intelligence and discretion of its other servants; but it only guarantees that those to whom it delegates its duty of constructing, inspecting, and maintaining in repair the instrumentalities of labour, and of selecting and retaining its other servants, will not be negligent in the performance of the duty thus delegated to them. In other words, the railway is not an insurer of the result of the exercise of the delegated authority, but it does contract that that delegated authority shall be exercised with due care. Therefore, when the railway has done its duty in the construction, inspection, and maintenance in repair of the instrumentalities of labour, and in the selection of fellow-servants, it is not to be held liable for injuries to a servant that result solely from the negligence of his fellow-servants. Where the negligence of the railway in supplying defective appliances is the proximate cause of injury to a servant, it is no defence to the railway that the negligence of a fellow-servant concurred in causing the injury.¹ Nor is it a defence to the railway that the injury was caused by the negligence of a fellow-servant of the injured person concurring with the railway's proximate negligence in sending out a train with an inadequate force of train hands;² but where the negligence of a fellow-servant is the proximate cause of injury to a servant, the concurrence of negligence on

¹ G. T. Ry. v. Cummings, 106 U. S. 700; Ellis v. N. Y., L. E. & W. R. R., 95 N. Y. 546, 17 Am. & Eng. R. R. Cas. 641; Cone v. D. L. & W. R. R., 81 N. Y. 207, 2 Am. & Eng. R. R. Cas. 57; Paulmier v. E. Ry., 5 Vroom 151; Crutchfield v. R. & D. R. R., 76 N. C. 320; A. T. & S. F. R. R. v. Holt, 29 Kans. 149, 11 Am. & Eng. R. R. Cas. 206; Lawless v. C. R. R. R., 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; Elmer v. Locke, 135 Mass. 575, 15 Am. & Eng. R. R. Cas. 300; Ransier v. M. & St. L. Ry., 32 Minn. 331, 21 Am. & Eng. R. R. Cas. 601; Stringham v. Stewart, 100 N. Y. 516.

² Booth v. B. & A. R. R., 73 N. Y. 33.

the part of the railway, either in supplying the defective appliances,¹ or in failing to provide an adequate force of servants,² will not render the railway liable for the injury. Where a machine consists of separate parts, which must be put together before the machine can be operated, an injury to a servant resulting from the insufficient putting together of those parts cannot be said to be due to the failure of the railway to provide safe appliances ; and when such parts are insufficiently put together by a fellow-servant of the injured servant, the railway is not liable, for the negligence is not its own but that of the fellow-servant.³

VI. THE LIABILITY OF RAILWAYS TO THEIR MINOR SERVANTS.

313. It is the duty of a railway to its minor servants to exercise a reasonable care for their safety, and not to place them in positions of danger unsuited to their years and capacity.⁴ Nevertheless a minor servant, if he be of more than tender years, takes upon himself the ordinary risks of the service, including the risk of injury from the negligence of his fellow-servants.⁵ In

¹ *Pease v. C. & N. W. Ry.*, 61 Wisc. 163, 17 Am. & Eng. R. R. Cas. 527.

² *Harvey v. N. Y. C. & H. R. R.*, 88 N. Y. 481, 8 Am. & Eng. R. R. Cas. 515.

³ *Peschel v. C. M. & St. P. Ry.*, 62 Wisc. 338, 17 Am. & Eng. R. R. Cas. 545.

⁴ *Hill v. Gust*, 55 Ind. 45; *St. L. & S. E. Ry. v. Valirius*, 56 Ind. 511; *Coombs v. N. B. Cordage Co.*, 102 Mass. 522; *Penna. Co. v. Long*, 94 Ind. 250, 15 Am. & Eng. R. R. Cas. 345.

⁵ *Viets v. T. A. A. & G. T. Ry.*, 55 Mich. 120, 18 Am. & Eng. R. R. Cas. 11; *H. & G. N. R. R. v. Miller*, 51 Tex. 270; *Gartland v. T. W. & W. Ry.*, 67 Ill. 498; *King v. B. & W. R. R.*, 9 Cush. 112; *T. & P. Ry. v. Carlton*, 60 Tex. 397, 15 Am. & Eng. R. R. Cas. 350; *Greenwald v. M. H. & O. Ry.*, 49 Mich. 197, 8 Am. & Eng. R. R. Cas. 133; *McGinnis v. C. S. B. Co.*, 49 Mich. 466, 8 Am. & Eng. R. R. Cas. 135; *Youll v. S. C. & P. Ry.*, 56 Iowa 346, 21 Am. & Eng. R. R. Cas. 589.

this connection the case of *U. P. R. R. v. Fort*¹ must be considered. The facts in that case were, that the injured servant, a boy of sixteen years of age, who had been, with his father's consent, engaged as a helper to a workman in a railway's machine shop, with the obligation of obeying that workman's orders, was, on one occasion several months after his entry into the service, ordered by that workman to ascend a ladder resting on a shaft among rapidly moving and dangerous machinery for the purpose of adjusting a belt which had gotten out of place, and having been injured by acting in obedience to that order the father brought an action to recover damages for a breach of the contract of service. Dillon, J., left it to the jury to find whether, or not, the duty imposed upon the minor servant by the order of the workman was within the contract of service; and he further directed them, that if that duty was not within the contract of service, and if the imposition of that duty upon the minor was wrongful and negligent, the railway was liable therefor, for "the principle, that the master is not liable for the neglect of a co-employé in the same service has no application, or no just application, to such a case." The report is not very explicit, but the jury appear to have found generally for the plaintiff, and also, specially, that the injured servant was engaged to serve under the workman, and "was required to obey his orders," that the order of the workman, in obeying which the minor was injured, was not within the scope of the minor's duty, but was within that of the workman, was not a reasonable one, and that a prudent man would not have ordered the minor to perform it. Judgment for the plaintiff on this verdict was affirmed in the Supreme Court of the United States,

¹ 17 Wall. 553.

Bradley, J., dissenting. Davis, J., put the judgment of affirmance on the ground that the general rule of the master's exemption from liability for injury done to a servant by the negligence of a fellow-servant, being founded upon the servant's implied undertaking to bear the risk of injury from such negligence, was inapplicable, because the act in the doing of which the minor servant was injured was not within the contract of service, and he added, somewhat inconsequently, "if it were otherwise, principals would be released from all obligation to make reparation to an employé in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not." He further said, referring to the workman's order to the injured servant: "for the consequences of this hasty action the company are liable, either upon the maxim of *respondeat superior*, or upon the obligation arising out of the contract of service. The order of Collett (the workman) was their order." The judgment in this case is open to obvious criticism. The injured servant was not an infant of tender years, nor an inexperienced servant. He was a boy of sixteen years of age, who had had the experience of "several months" of service in the railway's machine shop. His father, by his consent to the contract of service, had impliedly undertaken on his behalf to bear the risk of the very injury that happened, for the jury found specially that by the contract of service the boy was required to obey the workman's orders. The workman was not a vice-principal unless every superior servant is as to every inferior servant to be held to be a vice-principal. With this case there can be profitably contrasted *Murphy v. Smith*,¹

¹ 19 C. B. N. S. 361, 115 E. C. L.

which, although cited upon the argument of U. P. R. *v.* Fort, was not noticed by Davis, J., in his judgment. In the English case the defendant was the proprietor of a lucifer match factory ; one Simlack was his foreman, or general manager, and under him was a workman named Debör, who, in Simlack's absence, assumed the management of the establishment ; the plaintiff, a boy of sixteen years of age, having been engaged by Simlack as the defendant's servant, undertook, without any direction from Debör, but in his presence, to perform a part of the process of making matches which it was not his duty to do, and which if not done skillfully was dangerous, and in doing that he was injured. There was no proof that Simlack was absent at the time. After a verdict for the plaintiff, the court made absolute a rule to enter a nonsuit, on the ground that while there was evidence that Simlack was a vice-principal, there was no such evidence as regards Debör, who must be considered as only a fellow-servant, for whose negligence the defendant was not to be held liable. As the result of a careful comparison of these cases, I venture to think that Murphy *v.* Smith was rightly, and U. P. R. R. *v.* Fort wrongly, decided.

314. Where a railway receives into its service a minor without the consent of his father, or, if the father be dead, of his mother, and the minor be injured without fault upon his part, the railway is liable therefor to the father, or, if the father be dead, to the mother;¹ but if the minor has, with his parents' consent, been taken into the railway service to work in a railway yard, the fact that he is afterwards, with his own consent, put on duty as a brakeman on the line, is not on the part of the railway

¹ Hamilton *v.* G., H. & S. A. Ry., 54 Tex. 556, 4 Am. & Eng. R. R. Cas. 528 ; H. & G. N. R. R. *v.* Miller, 49 Tex. 322 ; O. & M. Ry. *v.* Tindall, 13 Ind. 366 ; Penna. Co. *v.* Long, 94 Ind. 250, 15 Am. & Eng. R. R. Cas. 345.

such negligence as renders it liable for injuries happening to him.¹ In *G. R. & I. R. R. v. Showers*,² where a minor servant, who had been engaged without the consent of his father, was killed by the negligence of his fellow-servants, the recovery was limited to the reasonable value to the parent of his son's services during the period of his engagement with the railway.³

VII. THE SERVANT'S IMPLIED UNDERTAKING TO BEAR THE RISKS INCIDENT TO THE SERVICE.

Railway servants do not impliedly take upon themselves the risk of injury from the railway's non-performance of its duty, either in supplying or maintaining the appliances of labour, or in selecting or retaining servants; but they do take upon themselves the ordinary risks of the service, including the negligence of their fellow-servants.

315. Railway servants, as has been stated, do not take the risk of injury from the railway's failure to perform its duty in constructing and maintaining in repair its line, rolling stock, machinery, and appliances, nor in exercising due care in its selection or retention of its other servants; nor do they take the risk of injury from the negligent participation of the railway's vice-principals in their work; but they do take the risk of injury from those dangers which are necessarily incident to the service upon which they have entered, and which do not result from negligence on the part of the railway.⁴ The rule is nowhere more clearly stated than

¹ *T. & P. Ry. v. Carlton*, 60 Tex. 397, 15 Am. & Eng. R. R. Cas. 350.

² 71 Ind. 451, 2 Am. & Eng. R. R. Cas. 9.

³ See also *C. & G. E. R. R. v. Harney*, 28 Ind. 28.

⁴ *Hutchinson v. Y., N. & B. Ry.*, 5 Ex. 343; *Riley v. Baxendale*, 6 H. & N. 445; *Wigget v. Fox*, 11 Ex. 832, which is sometimes cited in support of this proposition, is explained by Channell, B., in *Abraham v. Reynolds*, 5 H. & N. 143, and is criticised by Cockburn, C. J., in *Rourke v. Colliery Co.*, 2 C. P. D. 207; *Penna. Co. v. Lynch*, 90 Ill. 334; *St. L. & S. E. Ry. v. Britz*, 72 Id. 261; *Clark v. C. B. & Q. R. R.*, 92 Id. 43; *C. P. Mfg. Co. v. Ballou*, 71 Id. 418;

in *C. & X. R. R. v. Webb*,¹ by Sutcliff, C. J., who says: "a person who seeks and engages in any employment thereby assumes the ordinary risk, hazard, and danger incident to the place and the duties which, for the consideration agreed upon, he has undertaken to discharge. This is equally true of employés upon railroad trains as well as elsewhere, and in all other kinds of business and positions. Whether the employé seek employment in a machine shop, or on board a steamboat, upon a railroad train, or to pilot rafts over dangerous rapids, to labour in a powder-mill, or to serve upon a whale ship, or upon a voyage of discovery in the Arctic regions ; in each and all of the several employments and positions chosen, the employé, by entering the service voluntarily, takes upon himself the hazard and dangers properly incident to the service in which he engages ; and the employer is, in no sense, from the relation they sustain to each other, a warrantor of the safety of the employé." So, in *Sweeney v. B. & J. E. Co.*,² Danforth, J., said : "the general rule is, that the servant accepts the service, subject to the risks incidental to it ; and where the machinery and implements of the employé's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards."

316. There is no implied obligation upon the part of the master to indemnify the servant against the ordinary risks of the service, and the servant, when injured, can only recover upon proof that the master knew of a danger which was unknown to the servant, and which

Hughes *v. W. & St. P. R. R.*, 27 Minn. 137 ; Gibson *v. E. Ry.*, 63 N. Y. 449 ; DeForest *v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. R. Cas. 495 ; Sweeney *v. C. P. Ry.*, 87 Cal. 15, 8 Am. & Eng. R. R. Cas. 151 ; Naylor *v. C. & N. W. Ry.*, 53 Wisc. 661.

¹ 12 Ohio St. 475.

² 101 N. Y. 520, 524.

the master did not make known to him.¹ Upon this principle, train hands take the risk of injury from the negligent movement of other trains;² from the explosion of nitro-glycerine while being moved in or loaded upon cars;³ from the danger of strain in handling heavy freight;⁴ from the derailment of their train by its collision with trespassing cattle on an unfenced line;⁵ from being struck by engines or cars moving in a railway yard, without notice and unattended;⁶ from accumulations of ice and snow on or near the track;⁷ from the jolting of cars on a siding, by reason of worn rails being used in its construction;⁸ from slipping on ashes dropped from the fire-box of an engine while coupling cars;⁹ from the jolting of freight cars in making a flying switch, while the injured ser-

¹ *Priestley v. Fowler*, 3 M. & W. 1; *Williams v. Clough*, 3 H. & N. 258; *Watling v. Oastler*, I. R. 6 Ex. 73; *Griffiths v. L. & St. K. Docks Co.*, 12 Q. B. D. 493, 13 Id. 259; *Seymour v. Maddox*, 16 Q. B. 327, 71 E. C. L.; *Sykes v. Packer*, 99 Penna. St. 465.

² *Randall v. B. & O. R. R.*, 109 U. S. 478; *Slater v. Jewett*, 84 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515; *McCosker v. L. I. R. R.*, 84 N. Y. 77, 5 Am. & Eng. R. R. Cas. 564.

³ *Foley v. C. & N. W. Ry.*, 48 Mich. 622, 6 Am. & Eng. R. R. Cas. 161.

⁴ *Walsh v. St. P. & D. R. R.*, 27 Minn. 367, 2 Am. & Eng. R. R. Cas. 114.

⁵ *Sweeny v. C. P. R. R.*, 57 Cal. 15, 8 Am. & Eng. R. R. Cas. 151; *Fleming v. St. P. & D. R. R.*, 27 Minn. 111.

⁶ *Kelley v. C. M. & St. P. Ry.*, 53 Wisc. 74, 5 Am. & Eng. R. R. Cas. 469; *Hallihan v. II. & St. J. R. R.*, 71 Mo. 113, 2 Am. & Eng. R. R. Cas. 117; *C. & N. W. Ry. v. Donahue*, 75 Ill. 106; *T. & P. Ry. v. Harrington*, 62 Tex. 597, 21 Am. & Eng. R. R. Cas. 571; *Speed v. A. & P. R. R.*, 71 Mo. 303, 2 Am. & Eng. R. R. Cas. 77. In *Berg v. C. M. & St. P. Ry.*, 50 Wisc. 419, 2 Am. & Eng. R. R. Cas. 70, the railway was held liable, under a statute of Wisconsin, to a trackman who was injured while working in a railway yard, by the failure of the hands on a moving train to give him notice of its approach.

⁷ *Piqnegro v. C. & G. T. Ry.*, 52 Mich. 40, 12 Am. & Eng. R. R. Cas. 210; cf. *Fifield v. N. R. R.*, 42 N. H. 225.

⁸ *M. C. R. R. v. Austin*, 40 Mich. 247.

⁹ *Hughes v. W. & St. P. R. R.*, 27 Minn. 137.

vant is standing on the top of the cars;¹ from being knocked off their cars by a bridge when their duty requires them to ride on the top of a freight car;² and from being knocked off their cars by the projecting awning of an elevator;³ or by the projecting roof of a station.⁴ Train hands also take the risks of injury from inequalities in the track and the defects of appliances, whose condition is known to them, and of which they have not complained;⁵ and of their feet being caught in a frog at a switch;⁶ and of travelling to the repair shop with a patently defective car;⁷ of falling through a railway bridge in process of being repaired while walking over it in the discharge of their duty.⁸ Train hands also take the risks of defects in the cars, where the existence of those defects is not the result of negligence on the part of the railway, as, for instance, the unexpected breaking of a brake-staff;⁹ or the breaking

¹ *Yorell v. S. C. & P. Ry.*, 66 Iowa 346, 21 Am. & Eng. R. R. Cas. 589.

² *P. & C. Ry. v. Sentmayer*, 92 Penna. St. 276, 5 Am. & Eng. R. R. Cas. 508; *Owen v. N. Y. C. R. R.*, 1 Lans. 108; *Devitt v. P. R. R.*, 50 Mo. 302; *B. & O. R. R. v. Stricker*, 51 Md. 47; *Rains v. St. L., I. M. & S. Ry.*, 71 Mo. 164, 8 Am. & Eng. R. R. Cas. 610; *Wells v. B., C., R. & N. R. R.*, 56 Iowa 520, 2 Am. & Eng. R. R. Cas. 243; *Baylor v. D., L. & W. Ry.*, 40 N. J. L. 23; *Gibson v. M. Ry.*, 2 Ont. (Can.) 658; *Clark v. R. & D. R. R.* 78 Va. 709, 18 Am. & Eng. R. R. Cas. 78; *sed contra*, *B. & O. & C. R. R. v. Rowan*, 104 Ind. 88, 23 Am. & Eng. R. R. Cas. 390.

³ *Clark v. St. P. & S. C. R. R.*, 28 Minn. 128, 2 Am. & Eng. R. R. Cas. 240.

⁴ *Gibson v. E. Ry.*, 63 N. Y. 449; *sed. cf. W. Ry. v. Elliott*, 98 Ill. 481, 4 Am. & Eng. R. R. Cas. 651. It would seem that the railway ought to be held liable where the construction, collision with which does the injury, is under the control of the railway.

⁵ *P. & R. R. R. v. Schertle*, 97 Penna. St. 450; *DeForest v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. R. Cas. 495.

⁶ *L. S. & M. S. Ry. v. McCormick*, 74 Ind. 540; *Smith v. St. L., K. C. & N. Ry.*, 69 Mo. 32.

⁷ *Flannagan v. C. & N. W. Ry.*, 45 Wisc. 98, 50 Id. 462, 2 Am. & Eng. R. R. Cas. 150; *C. & N. W. Ry. v. Ward*, 61 Ill. 130; *Watson v. H. & T. C. Ry.*, 58 Tex. 434, 11 Am. & Eng. R. R. Cas. 213.

⁸ *Koontz v. C. R. I. & P. Ry.*, 65 Iowa 224, 18 Am. & Eng. R. R. Cas. 85.

⁹ *Smith v. C. M. & St. P. Ry.*, 42 Wisc. 520.

of a ladder on a car from the shortness of a bolt fastening the slat;¹ or the breaking of the eye bolt of a brake chain from a latent defect.² Train hands also take the ordinary risks in coupling cars,³ even though the car load project beyond the ends of the platforms of the car.⁴ Train hands also take the risk of coupling defective cars which have been marked as such and put aside, for the purpose of moving them to the repair shop,⁵ and of shunting or switching a defective car in a railway yard, even though no express notice was given of the defective condition of the particular car;⁶ but it has been held that they do not take the risk of negligence

¹ *Ballou v. C. & N. W. Ry.*, 54 Wisc. 257, 5 Am. & Eng. R. R. Cas. 480; *C. & A. R. R. v. Platt*, 89 Ill. 141; *T. W. & W. Ry. v. Ingraham*, 77 Id. 309.

² *Painton v. N. C. Ry.*, 83 N. Y. 7, 5 Am. & Eng. R. R. Cas. 454.

³ *Day v. T. C. S. & D. Ry.*, 42 Mich. 523, 2 Am. & Eng. R. R. Cas. 126; *T. W. & W. R. R. v. Black*, 88 Ill. 112; *L. S. & M. S. Ry. v. McCormick*, 74 Ind. 440; *M. C. R. R. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. R. Cas. 101; *Viets v. T., A., A. & G. T. Ry.*, 55 Mich. 120, 18 Am. & Eng. R. R. Cas. 11; *M. P. Ry. v. Lyde*, 57 Tex. 505, 11 Am. & Eng. R. R. Cas. 188; *Skellenger v. C. & N. W. Ry.*, 61 Iowa 714, 12 Am. & Eng. R. R. Cas. 206; *Hathaway v. M. C. R. R.*, 51 Mich. 253, 12 Am. & Eng. R. R. Cas. 249; *C. & R. I. Ry. v. Clark*, 108 Ill. 113, 15 Am. & Eng. R. R. Cas. 261; *B., C., R. & N. R. R. v. Coates*, 62 Iowa 487, 15 Am. & Eng. R. R. Cas. 265; *Rodman v. M. C. R. R.*, 55 Mich. 57, 17 Am. & Eng. R. R. Cas. 521; *Pease v. C. & N. W. Ry.*, 61 Wisc. 163, 17 Am. & Eng. R. R. Cas. 527; *Fowler v. C. & N. W. Ry.*, 61 Wisc. 169, 17 Am. & Eng. R. R. Cas. 536; *Umback v. L. S. & M. S. Ry.*, 83 Ind. 191, 8 Am. & Eng. R. R. Cas. 98; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140; *N. C. & St. L. Ry. v. Wheeler*, 10 Lea (Tenn.) 741, 4 Am. & Eng. R. R. Cas. 633; *H. & T. C. Ry. v. Myers*, 55 Tex. 110, 8 Am. & Eng. R. R. Cas. 114; *Batterson v. C. & G. T. Ry.*, 49 Mich. 184, 8 Am. & Eng. R. R. Cas. 123; *L. R. & F. S. Ry. v. Townsend*, 41 Ark. 382, 21 Am. & Eng. R. R. Cas. 619; *A., T. & S. F. R. R. v. Wagner*, 33 Kans. 660, 21 Am. & Eng. R. R. Cas. 637.

⁴ *N. C. Ry. v. Husson*, 13 Weekly Notes of Cases (Penna.) 361, 12 Am. & Eng. R. R. Cas. 241; *A., T. & S. F. Ry. v. Plunkett*, 25 Kans. 188, 2 Am. & Eng. R. R. Cas. 127; *Day v. T., C., S. & D. Ry.*, 42 Mich. 523, 2 Am. & Eng. R. R. Cas. 126; *Hamilton v. D. M. V. Ry.*, 36 Iowa 31; *cf. Brown v. A., T. & S. F. Ry.*, 31 Kans. 1, 15 Am. & Eng. R. R. Cas. 271.

⁵ *Watson v. H. & T. C. R. R.*, 58 Tex. 434, 11 Am. & Eng. R. R. Cas. 213.

⁶ *Yeaton v. B. & L. R. R.*, 135 Mass. 418, 15 Am. & Eng. R. R. Cas. 253; *Fraker v. St. P., M. & M. Ry.*, 32 Minn. 54, 15 Am. & Eng. R. R. Cas. 256.

of car inspectors in a yard in failing to mark damaged cars, so as to give notice of the condition of such cars to those who may be called on to couple them.¹

317. Firemen, or stokers, take the risk of injury from "bucking" snow on the line, that is, from driving the engine at speed into a snow bank for the purpose of clearing the line of snow.² Station hands take the risk of injury from throwing mail bags into moving trains.³ Car repairers, while working beneath cars in a railway yard take the risk of injury from the car being struck by another car, when they habitually do such work without asking that the car be protected by a flag;⁴ but in one case the railway was held liable to a servant injured while similarly engaged, the railway having conceded by its answer that under its regulations the car should have been protected by flags,⁵ and in other similar cases of injury the railway was held liable by reason of the failure of the foreman of the injured servant to take precautions for his safety by guarding the car.⁶

318. Labourers on the line take the risk of injury from a defective condition of the roadbed when engaged to repair it; thus, in *R., N. Y. & P. R. R. v. Brick*,⁷ a labourer engaged in the reconstruction of a dilapidated line, and while being carried over the line in a construction train, was killed by the derailment of a train at a level crossing, caused by the freezing of mud which had been negligently permitted to fill up and remain in

¹ *Tierney v. M. & St. L. Ry.*, 33 Minn. 311, 21 Am. & Eng. R. R. Cas. 545.

² *Bryant v. B., C. R. & N. R. R.*, 66 Iowa 305, 21 Am. & Eng. R. R. Cas. 593.

³ *Coolbroth v. M. C. R. R.*, 77 Me. 165, 21 Am. & Eng. R. R. Cas. 599.

⁴ *O'Rorke v. U. P. Ry.*, Colo. , 18 Am. & Eng. R. R. Cas. 19; *Penna. Co. v. Stoeike*, 104 Ill. 201, 8 Am. & Eng. R. R. Cas. 523.

⁵ *Luebke v. C., M. & St. P. Ry.*, 59 Wisc. 127, 15 Am. & Eng. R. R. Cas. 183.

⁶ *L. S. & M. S. Ry. v. Lavalle*, 36 Ohio St. 221, 5 Am. & Eng. R. R. Cas. 549; *Moore v. W., St. L. & P. Ry.*, 84 Mo. 481, 21 Am. & Eng. R. R. Cas. 509.

⁷ 98 N. Y. 212, 21 Am. & Eng. R. R. Cas. 605.

the spaces between the rails and the planking of the crossing. Judgment on a verdict for the plaintiff was reversed in error, Miller, J., saying *inter alia*, "it may be assumed, we think, that the deceased in performing the service in which he was engaged and in travelling on the construction train, understood that he was not working upon a road which was finished and in good repair, but upon one which, having been long neglected and but little travelled and latterly only by construction trains, subjected him to greater risks and perils than would be incurred under ordinary circumstances. In entering the defendant's service he assumed the hazards incident to the same." On the other hand, in *Madden v. M. & St. L. Ry.*,¹ the railway was held liable to a train hand on a gravel train engaged in resurfacing the roadbed, the train being derailed by the bad condition of the roadbed, Gilfillan, C. J., saying: "there is no difference as to the duty of the master and the assumption of risk by the servant between an employment to make repairs and any other employment. In all cases the servant is held to take on himself the risks necessarily incident to the employment, unless, perhaps, they be latent and known to the master, but not known to nor by the use of proper diligence, discoverable by the servant; and in no case does he take on himself the risks that arise by reason of neglect on the part of the master, unless they be known to him, or by the use of proper diligence are discoverable to him. * * * The fact that the work in which the plaintiff was employed was that of repairing, or making preparations to repair, the track did not diminish its duty to furnish safe and suitable means and instruments to do his work. As it required him, in that work, to use the old track it should have had it reasonably safe for the purpose." On this sub-

¹ 32 Minn. 303, 18 Am. & Eng. R. R. Cas. 63.

ject, the doctrine of the *Brick* case would seem to be sound. Labourers on the line also take the risk of injury from the derailment of their train in pushing through a snow bank;¹ of a bank of earth caving in on them while digging;² of the negligent movement of trains upon the line;³ of being struck by a passing train in a tunnel, while engaged in repairing the tunnel,⁴ and of being injured by defects in tools.⁵ Well-diggers take the risk of injury from the caving in of a well in process of excavation.⁶ An ostler in a railway's stable takes the risk of being kicked by a vicious horse whose character is known to him.⁷

319. There are authorities for the proposition that servants do not impliedly undertake to bear the risk of injury in any special service, which does not fall within their duties as defined by their contract of service, but which they are ordered to perform by a superior officer, as, for instance, where one who had been engaged as brakeman on a passenger train, was injured while coupling freight cars in a railway yard under the orders of the superintendent of a division of the line,⁸ or where a labourer in a railway yard who, having no experience in coupling cars, was ordered by his foreman to perform that service, and while so doing was injured

¹ *Howland v. M., L. S. & W. Ry.*, 54 Wisc. 226, 5 Am. & Eng. R. R. Cas. 578; *M. & St. L. Ry. v. Morse*, 30 Minn. 465, 11 Am. & Eng. R. R. Cas. 168.

² *Naylor v. C. & N. W. Ry.*, 53 Wisc. 661, 5 Am. & Eng. R. R. Cas. 460; *Simmons v. C. & T. R. R.*, 110 Ill. 340, 18 Am. & Eng. R. R. Cas. 50; *Morey v. L. V. Coal Co.*, 55 Iowa 671; *Rasmussen v. C., R. I. & P. Ry.*, 65 Iowa 236, 18 Am. & Eng. R. R. Cas. 54.

³ *P. R. R. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. R. Cas. 187; *McGrath v. N. Y. & N. E. R. R.*, Mass. , 18 Am. & Eng. R. R. Cas. 5; *I. & G. N. R. R. v. Hester*, 64 Tex. 401, 21 Am. & Eng. R. R. Cas. 535; *P., C. & St. L. R. R. v. Leech*, 41 Ohio St. 388, 21 Am. & Eng. R. R. Cas. 541, note.

⁴ *Woodley v. M. D. Ry.*, 2 Ex. D. 384.

⁵ *L. R. & F. S. Ry. v. Duffey*, 35 Ark. 602, 4 Am. & Eng. R. R. Cas. 637.

⁶ *G., H. & S. A. R. R. v. Lempe*, 59 Tex. 19, 11 Am. & Eng. R. R. Cas. 201.

⁷ *G. & C. St. Ry. v. Bresmer*, 94 Penna. St. 103.

⁸ *Jones v. L. S. & M. S. Ry.*, 49 Mich. 573, 8 Am. & Eng. R. R. Cas. 221.

by the negligence of an engine-driver;¹ nor do servants take the risks of negligence on the part of another railway, upon whose line or premises they are compelled to go in the performance of their duty to the railway whom they serve, nor the risks of negligence on the part of another railway which exercises either statutory or contractual running powers over the line of the company they serve.

320. Railway servants also impliedly assume the risk of injury from negligence on the part of their fellow-servants. This rule was not enunciated in *Priestley v. Fowler*,² but it is the necessary result of the decision in that case which rests the liability of the master upon his personal negligence, for a master cannot be said to be personally negligent if an injury is caused to a servant by the negligence of a fellow-servant, in whose original selection and subsequent retention in his post the master has exercised due care. The rule was first distinctly enunciated in South Carolina in 1841, in *Murray v. S. C. R. R.*,³ where a fireman having been injured by the negligence of an engine-driver, the railway was held not to be liable, for the reason that the engine-driver no more represented the railway than did the fireman, and each was liable to the railway for himself and not for his fellow, and the railway was not liable to either for the failure of the other. The next case is *Farwell v. B. & W. R. R.*,⁴ in which judgment was delivered in 1842 by Shaw, C. J. An engine-driver having been injured by the negligence of a switch-tender, the railway was held not to be liable, and the great Chief Justice of Massachusetts rested the

¹ *Lalor v. C. B. & Q. R. R.*, 52 Ill. 401; see also *C. & G. E. R. R. v. Harney*, 28 Ind. 28; *U. P. R. R. v. Fort*, 17 Wall. 553; *C. & N. W. Ry. v. Bayfield*, 37 Mich. 205; *Miller v. U. P. Ry.*, 17 Fed. Rep. 67.

² 3 M. & W. 1.

³ 1 McMullan 385.

⁴ 4 Metc. 49, 1 Redf. Am. Ry. Cas. 395.

exemption of the railway from liability to the plaintiff upon the ground that the liability of a master for the negligence of his servant, acting in the course of his employment, and within the scope of his authority, and causing injury to a stranger, is dependent upon the want of privity between the master and the stranger, but that the liability of a master to a servant, for injuries caused by the negligence of a fellow-servant, must, if it exist, be maintained upon the ground of an implied contract upon the part of the master to indemnify every servant against such injuries, and that the want of adjudged cases illustrating the applications of such an implied contract, is a denial of its existence. The Chief Justice also stated, with force, certain general considerations of public policy, which were very similar to those put forth by Abinger, C. B., in *Priestley v. Fowler*,¹ but which I neither quote nor rely upon, because it seems to me that judicial enunciations of legal principles should have a more stable foundation than considerations of public policy, which are not always capable of exact definition, and which, under changed circumstances and conditions, may be of questionable applicability. The rule was first applied in England in *Hutchinson v. Y., N. & B. Ry.*,² decided in 1850. In that case an administratrix having brought suit under Lord Campbell's Act, averred in her declaration, that her decedent, a servant upon a train of the defendant, was killed in a collision by the negligence of the defendant, etc. The defendant pleaded specially that the collision was solely caused by the negligence of the defendant's servants, who were fit and competent persons to have the government and guidance of the colliding trains, etc. On demurrer to this plea, judgment was entered for the defendant, Alderson, B., say-

¹ 3 M. & W. 1.

² 5 Ex. 343.

ing, "the principle upon which a master is, in general, liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is that the act of his servant is, in truth, his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passerby, he is, of course, responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will, may be treated by others as the act of the master, *qui facit per alium, facit per se.* So far there is no difficulty. Equally clear is it, that though a stranger may treat the act of the servant as the act of his master, yet, the servant himself, by whose negligence or want of skill the accident has occurred, cannot, and, therefore, he cannot defend himself against the claim of a third person; nor, if by his unskilfulness he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds for these distinctions are so obvious as to need no illustrations. The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not, in general, responsible, when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted that, if by the unskilfulness of A., a stranger is injured, the master is responsible. Not so, if A., by his unskilfulness, hurts himself; he cannot treat that as the want of skill

of his master. Suppose then, that by the unskilfulness of A., B., the other servant, is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They are both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms, that as between himself and his master, he would run this risk." In *Bartonhill Coal Co. v. Reid*,¹ where it was held that a mine-owner was not liable to a miner in his service for injuries resulting from the negligence of another servant, whose duty it was to operate the engine, by whose power the miners were brought up from the pit, Lord Cranworth said: "when the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow-servant may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was a party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of the master for the ill consequences of his

¹ 3 Macq. II. L. 282.

servant's carelessness, is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work." In *Wilson v. Merry*,¹ where a mine-owner was held not to be liable for the death of a servant caused by the negligence of a fellow-servant in erecting a scaffold which obstructed the circulation of air in the mine, Lord Chancellor Cairns, after quoting from Lord Cranworth's judgment in *Bartonshill Coal Co. v. Reid*, said: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is, in any technical sense, the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself; the rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist: *Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus.*"² The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master, in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute, in person, the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous, to his servants, for the master might be incompetent personally to perform his work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in

¹ L. R. 1 S. C. & D. 326.

² *Donellus de Jure Civ. L. 9, c. 2, n.*

person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons selected are guilty of negligence, this is not the negligence of the master." In *Randall v. B. & O. R. R.*,¹ the rule is distinctly recognized by the Supreme Court of the United States. There are, however, some cases in which the doctrine is denied;² and in *L. & N. Ry. v. Collins*,³ the railway was held liable for injuries caused to a labourer by the negligence of an engine-driver in putting the engine in motion, while the labourer was, as the engine-driver knew, engaged in making some repairs under the engine, the ground of decision being that the doctrine of agency rendered the corporation liable for the negligence of its servants causing injury to other servants as well as to strangers. The unsoundness of this reasoning has been sufficiently shown by the quotations which have been made from the judgments in those cases which maintain the opposing view upon this question.

321. The general rule, therefore, is that servants take the risk of the negligence of their fellow-servants and the master, if he has not been negligent in the selection or retention of the negligent fellow-servant, is not impliedly liable to indemnify them for any injury resulting from the negligence of that fellow-servant.⁴

¹ 109 U. S. 478.

² *Chamberlain v. M. & M. R. R.*, 11 Wisc. 238; *L. & N. Ry. v. Collins*, 2 Duvall 114; *McLeod v. Ginther*, 80 Ky. 399, 8 Am. & Eng. R. R. Cas. 162; *Haynes v. E., T. V. & G. R. R.*, 3 Cold. (Tenn.) 222.

³ 2 Duvall 114.

⁴ *Hutchinson v. Y., N. & B. Ry.*, 5 Ex. 343; *Wigmore v. Jay*, Id. 354; Bar-

The common object of railway service being that of fitting the line for traffic, and of carrying on the traffic, all who are employed in the accomplishment of that object, and whose negligence may be the cause of injury to one another, are to be deemed fellow-servants.

322. At one time in England some of the judges manifested an inclination to restrict within narrow limits the doctrine of the master's immunity from responsibility to a servant for injuries caused by the negligence of a fellow-servant; thus, in *Holmes v. Clarke*,¹ Pollock, C. B., said: "it would be quite consistent with the authorities if we were to hold that a footman might recover against his master for injury arising from the neglect of the coachman or groom, the services being different," and in *Bartonhill Coal Co. v. McGuire*,² Chelmsford, C., intimated that a carpenter in the railway service, engaged in repairing a railway carriage, could not be considered a fellow-servant of the engine-

tonhill Coal Co. *v. Reid*, 3 *Maeq. H. L.* 266; *Vose v. L. Y. Ry.*, 2 *H. & N.* 723; *Wigget v. Fox*, 11 *Ex.* 832; *Waller v. S. E. Ry.*, 2 *H. & C.* 102; *Hall v. Johnson*, 3 *Id.* 589; *Searle v. Lindsay*, 11 *C. B. N. S.* 429, 103 *E. C. L.*; *Lovegrove v. L. B. & S. C. Ry.*, 16 *C. B. N. S.* 669, 111 *E. C. L.*; *Farwell v. B. & W. R. R.*, 4 *Metc.* 49; *Hayes v. Western R. R.*, 3 *Cush.* 270; *Murray v. S. C. R. R.*, 1 *McMullan* 385; *Russell v. H. R. R. R.*, 17 *N. Y.* 134; *Lovell v. Howell*, 1 *C. P. D.* 161; *Charles v. Taylor*, 3 *Id.* 492; *Ryan v. C. V. R. R.*, 23 *Penna. St.* 110; *Frazier v. P. R. R.*, 38 *Id.* 104; *Gilman v. E. R. R.*, 10 *Allen* 233; *Hall v. Johnson*, 34 *L. J. Ex.* 222; *Morgan v. V. of N. Ry.*, *L. R.* 1 *Q. B.* 149; *Gillshannon v. S. B. R. R.*, 10 *Cush.* 223; *Coon v. S. R. R.*, 5 *N. Y.* 492; *Boldt v. N. Y. C. R. R.*, 18 *Id.* 432; *Wright v. N. Y. C. R. R.*, 25 *Id.* 562; *Honor v. Albrighton*, 93 *Penna. St.* 475; *Armour v. Hahn*, 111 *U. S.* 313; *Caldwell v. Brown*, 53 *Penna. St.* 453; *Allen v. New Gas Co.*, 1 *Ex. D.* 251; *Hand v. V. & C. R. R.*, 32 *Vt.* 473; *Randall v. B. & O. R. R.*, 109 *U. S.* 478, 15 *Am. & Eng. R. R. Cas.* 243; *Doughty v. L. D. Co.*, 76 *Me.* 143; *K. P. Ry. v. Salmon*, 11 *Kans.* 83; *Brabbits v. C. & N. W. Ry.*, 38 *Wisc.* 289; *M. C. R. R. v. Dolan*, 32 *Mich.* 510; *Robinson v. H. & T. C. Ry.*, 46 *Tex.* 540; *T. W. & W. Ry. v. Durkin*, 76 *Ill.* 395; *Day v. T. C. S. & D. Ry.*, 42 *Mich.* 523, 2 *Am. & Eng. R. R. Cas.* 126; *Whaalen v. M. R. & L. E. R. R.*, 8 *Ohio St.* 249; *Hunt v. C. & N. W. Ry.*, 26 *Iowa* 363; *Carle v. B. & P. C. R. R.*, 43 *Me.* 269; *P., F. W. & C. R. R. v. Devinney*, 7 *Ohio St.* 197.

¹ 6 *H. & N.* 357

² 3 *Macq. H. L.* 311.

driver and the switch-tender,¹ and he said:² "where servants are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception, and the master's liability attaches in that case in the same manner as if the servant stood in no relation to him," and in the same case,³ Lord Brougham said that fellow-servants are "men in the same common employment and engaged in the same common work under that common employment." Later cases in England have, however, given a much wider range to the scope of a common employment. In *Hutchinson v. Y., N. & B. Ry.*,⁴ a guard, or train hand, was held to be a fellow-servant with not only the engine-driver, guards, and hands on his train, but also with the servants performing the like duties on a train which came into collision with his train. Alderson, B., in delivering judgment for the defendant, said on this point: "the principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. The death of Hutchinson appears on the pleadings to have happened while he was acting in the discharge of his duties to the defendant as his master, and to have been the result of carelessness on the part of one or more other servant or servants of the same master while engaged in their service; and whether the death resulted from the mismanagement of the one train, or of the other, or of both, does not affect the principle; in any case, it arose

¹ See *McNaughton v. C. Ry.*, 19 Court of Sess. Ca. 271.

² P. 307.

³ P. 313.

⁴ 5 Exch. 343.

from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendant, agreed to run." So in *Waller v. S. E. Ry.*,¹ wherein it was held that a guard on a train, or train hand, was a fellow-servant with the "gauger of plate layers," or foreman of track repairs, by whose negligence the injury was occasioned, Pollock, C. B., said: "I think that the superintending the trains on their journey, and the taking care that the rails on which the carriages run are firmly and securely fastened and bolted constitute one common object, viz.: that the passengers shall be conveyed in carriages which are safe, and on rails which are free from danger. Where, indeed, two trains belonging to the same company are travelling on different lines of rail which, at a certain point, intersect each other or join a principal line, and, in consequence of the negligence of the driver of one of the trains, a collision ensues, by which the driver of the other train is injured, I own there seems to me less of what may be called an employment in one common object. No doubt the common object of the two servants is the driving their respective trains to their place of destination; but each of them has in particular a different object, one of them has one train under his control, the other another train. But in this case the common object of both servants was the safe conveyance of the passengers in that particular train, it being the duty of the one to superintend the carriages of the other, and to take care that the rails were in such a condition that the journey might be safely performed. Viewing this case with reference to the observation of Lord Cranworth in *Bartonshill Coal Co. v. Reid*, that when a workman contracts to do work of any particular sort,

¹ 2 H. & C. 102.

he knows or ought to know to what risks he is exposing himself, there can be no doubt that the guard of a railway train must anticipate, among other probable sources of danger on the journey, the neglect of a servant to oil the wheels of the carriages, the neglect of another to adjust the points, the neglect of another to take care that the rails are safely and securely fastened and bolted." In *Farwell v. B. & W. R. R.*,¹ Shaw, C. J., said: "it was strongly pressed in the argument, that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. * * * Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the ser-

vant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in *tort*, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a servant, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." In *Morgan v. V. of N. Ry.*,¹ the plaintiff, a carpenter in the railway service, while working on a scaffolding in the railway yard, was thrown down and injured by the negligence of some porters in the railway service in carelessly shifting an engine on a turn-table. The judge at the trial having nonsuited the plaintiff, the Q. B. discharged a rule to enter the verdict for the plaintiff. Blackburn, J., after referring to the general rule of a master's exemption from liability for injuries done to a servant by the negligence of a fellow-servant, said: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost every, if not

¹ 5 B. & S. 570, 117 E. C. L., L. R. 1 Q. B. 149.

every, case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The Queen's Bench having entered judgment against the plaintiff, the Exchequer Chamber affirmed that judgment, Erle, C. J., saying: "the plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for the traffic;" and Pollock, C. B., adding: "it appears to me that we should be letting in a flood of litigation were we to decide the present case in favour of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employés in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said with truth that no two had a common immediate object. This shows that we must not over-refine, but look at the common object and not at the common immediate object." In *Slater v.*

Jewett,¹ wherein the facts were identical with those in C., M. & St. P. Ry. v. Ross,² with the exception that the person injured was a fireman, and the persons whose negligence caused the injury were a telegraph operator and the conductor of the train which came into collision with that on which the injured fireman was serving. Judgment was entered for the defendant, and the grounds of the judgment, as stated by Folger, C. J., are that "each of these agents" [the telegraph operator and the conductor], "in doing their ordinary work for the defendant, were fellow-servants of the intestate in the same common employment. The conductor was engaged in the particular work in which the intestate was, that of moving trains. The telegrapher was engaged in a work closely connected therewith, that of receiving and giving information of the whereabouts of trains, and communicating orders to those controlling them for stopping or going on. This was a branch of the general business of the defendant essential to the smooth and successful movement of the whole, that branch of it in which the intestate was engaged as much as any other. * * * It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow-servant. The act required of the conductor at the particular time was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. It is contended that the duty of the telegrapher at the time and the act required of him were those that the defendant was bound to perform as master, and that the negligent performance by the operator was the negligence of the master. The argu-

¹ 85 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515.

² 112 U. S. 377.

ment to sustain this position consists, in part, in an effort to show that the duties of the operator were in no respect like to those of the intestate. They were not like, but they tended to the same end, that of the speedy, efficient, and successful carriage of passengers and freight over the railway. There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always alike, yet they are all done to bring one result, and it is their conjoint, simultaneous, and harmonious performance that does effect the finality, sought through the whole complex organism. If it be so that this operator sometimes received and sent messages that had naught to do therewith, still, on this occasion, the act required of him had direct connection with the acts of those engaged in moving the two trains. The position, that the operator was hired and discharged by one superior agent and the intestate by another, and that, therefore, they were not fellow-servants, is not sound. The general authority to hire and to turn away was in the defendant. It did radiate from him through different chiefs of department in his general work. His, however, was the ultimate power. The heads of bureaus were not independent contractors doing a branch of his work on their own responsibility, and free from his interference with their subordinates. He had the right to step into their spheres of duty, and act for himself.”¹

323. It, therefore, may be laid down as the result of the authorities, that the common object of railway service being that of fitting the line for traffic, and of carrying on the traffic, all servants who are working for the

¹ See also *Holden v. F. R. R.*, 129 Mass. 268; *Farwell v. B. & W. R. R.*, 4 Metc. 49; *Slater v. Jewett*, 85 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515; *Waller v. S. E. Ry.*, 2 H. & C. 102; *N. O., J. & N. R. R. v. Hughes*, 49 Miss. 258; *Valtez v. O. & M. Ry.*, 85 Ill. 500; *M. & M. R. R. v. Smith*, 59 Ala. 245; *McGowan v. St. L. & I. M. R. R.*, 61 Mo. 528.

accomplishment of that common object are fellow-servants within the rule. A very simple practical test is, as suggested in *Valtez v. O. & M. Ry.*,¹ to hold those to be fellow-servants whose negligence is likely to inflict injury on one another. Under this rule railway servants take the risk of injury from the negligence of their fellow-servants, while those fellow-servants are temporarily discharging the duties of stations other than their regular ones. This rule prevents a recovery by train hands if injured by the negligence of a fireman while acting as an engine-driver,² or of a conductor while acting as an engine-driver.³ It is held in some Illinois cases that the test of the existence of the relation of fellow-servants is, their habitual consociation and direct co-operation in the performance of a common work, so that they may influence each other to the exercise of care, and that the existence of such a relation in any case is a question of fact for the jury;⁴ thus, in *I. & St. L. Ry. v. Morganstern*,⁵ where the jury found that the plaintiff's decedent, an inspector of rolling stock in the defendant's service, had been killed by the negligence of the defendant's baggage-master, and also that the deceased and the baggage-master were not fellow-servants, judgment for the plaintiff on the verdict was affirmed in error, Craig, J., saying: "the definition of fellow-servant may be a question of law, but it is always a question of fact to be determined from the evidence

¹ 85 Ill. 500.

² *Greenwald v. M. H. & O. R. R.*, 49 Mich. 197, 7 Am. & Eng. R. R. Cas. 133.

³ *Rodman v. M. C. Ry.*, 55 Mich. 57, 18 Am. & Eng. R. R. Cas. 521.

⁴ *C. & N. W. Ry. v. Miranda*, 108 Ill. 576, 18 Am. & Eng. R. R. Cas. 564; *W. Ry. v. Elliott*, 98 Ill. 481, 4 Am. & Eng. R. R. Cas. 651; *Penn. Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. R. Cas. 243; *C. & A. R. R. v. Bonifield*, 104 Ill. 223, 8 Am. & Eng. R. R. Cas. 493; *I. & St. L. Ry. v. Morganstern*, 106 Ill. 216, 12 Am. & Eng. R. R. Cas. 228.

⁵ 106 Ill. 216, 12 Am. & Eng. R. R. Cas. 228.

whether a given case falls within that definition." But in the later case of *Abend v. T. H. & I. Ry.*,¹ the rule as generally held is asserted. In this case a foreman of wreckers, while being carried on a wrecking train to the scene of a wreck, voluntarily seated himself in the engine cab and was killed in a collision between that train and another train, and Mulkey, J., said: "the evidence shows that a wrecking force is always made up in the hurry of the moment out of the employés and servants of the company who happen to be within convenient reach, without regard to the particular line of service in which they are employed. The removing of obstructions from the tracks in case of a collision is, as shown by the proofs in this case, a distinct branch of service, to which all the labouring force of the company are liable to be called without any reference to their ordinary calling or duties, and when a force thus made up goes aboard the wrecking train and starts to the scene of disaster, they are all, including conductor, engineer, foreman and brakeman, put as much in a common branch of service while on the way as they are after their arrival and the work of clearing the track has commenced. It is an error to suppose that a force of men cannot be engaged in a common cause unless all are continuously working at the same time, and engaged in doing precisely the same kind of work. It is sufficient if all are actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end or purpose, sought to be accomplished by the united effort of all."

324. In the application of the rule of a common employment to the different departments and grades of railway service, the cases are very numerous, and it must be added, far from consistent. It has been held

¹ 111 Ill. 202, 17 Am. & Eng. R. R. Cas. 674.

that the following classes of servants are fellow-servants, the injured servant being named first, and the servant whose negligence has caused the injury being named last. Engine-driver and switch-tender or pointsman;¹ engine-driver and road-master, acting as switch-tender or pointsman;² engine-driver and train dispatcher;³ engine-driver and station agent acting as yard master;⁴ engine-driver and yard master;⁵ engine-driver and master mechanic in repair shop;⁶ fireman, or stoker, and his engine-driver;⁷ fireman, or stoker, and engine-driver of another engine;⁸ fireman, or stoker, and conductor of another train, and telegraph operator;⁹ fireman, or stoker, and switch-tender or pointsman;¹⁰ fireman, or stoker, and master mechanic in repair shop;¹¹ train hands, or guards, and conductor acting as engine-driver;¹² train hands, or guards, and train hands, or guards, of the same train;¹³ train hands, or guards, and foreman of labourers on line;¹⁴ train hands, or guards, and conductor of train;¹⁵ train hands, or guards, and

¹ *Farwell v. B. & W. R. R.*, 4 Metc. 49.

² *Walker v. B. & M. R. R.*, *Miller v. Same*, 128 Mass. 8, 1 Am. & Eng. R. R. Cas. 141.

³ *C. St. L. & N. O. Ry. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. R. Cas. 171; *Blessing v. St. L., K. C. & N. Ry.*, 77 Mo. 410, 15 Am. & Eng. R. R. Cas. 298.

⁴ *Brown v. M. & St. L. Ry.*, 31 Minn. 553, 15 Am. & Eng. R. R. Cas. 333.

⁵ *E. T. V. & G. R. R. v. Gurley*, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. R. Cas. 568.

⁶ *Hard v. C. Ry.*, 32 Vt. 473.

⁷ *Murray v. S. C. R. R.*, 1 McMullan 385; *Henry v. L. S. & M. S. Ry.*, 49 Mich. 495, 8 Am. & Eng. R. R. Cas. 110.

⁸ *L. & N. R. R. v. Robinson*, 4 Bush (Ky.) 507.

⁹ *Slater v. Jewett*, 85 N. Y. 61, 5 Am. & Eng. R. R. Cas. 515.

¹⁰ *King v. B. & W. R. R.*, 9 Cush. 112.

¹¹ *C. & I. C. R. R. v. Arnold*, 31 Ind. 174.

¹² *Rodman v. M. C. R. R.*, 55 Mich. 57, 17 Am. & Eng. R. R. Cas. 521.

¹³ *Hutchinson v. Y., N. & B. Ry.*, 5 Exch. 343.

¹⁴ *Waller v. S. E. Ry.*, 2 H. & C. 102.

¹⁵ *Frazier v. P. R. R.*, 38 Penna. St. 104; *Cassidy v. M. C. R. R.*, 76 Me. 488,

¹⁷ Am. & Eng. R. R. Cas. 519; *Heine v. C. & N. W. Ry.*, 58 Wisc. 528; *Pease v. Same*, 61 Wisc. 163, 17 Am. & Eng. R. R. Cas. 527.

engine-driver of another train;¹ train hands, or guards, and fireman, or stoker, of the engine of their train;² train hands, or guards, and engine-driver of their train;³ train hands, or guards, and train hands, or guards, of another train;⁴ train hands, or guards, and labourers on line;⁵ train hands, or guards, and inspector of car repairs;⁶ train hands, or guards, and fireman, or stoker;⁷ train hands, or guards, and train dispatcher;⁸ train hands, or guards, and yard master;⁹ train hands, or guards, and switch-tender;¹⁰ train hands, or guards, and yardmen who make up trains;¹¹ conductor and baggage-master of train;¹² switch-tender, or pointsman, and inspector of car repairs;¹³ labourers and foreman of track layers;¹⁴ labourers and engine-driver;¹⁵ labourers and

¹ *Randall v. B. & O. R. R.*, 109 U. S. 478, 15 Am. & Eng. R. R. Cas. 243.

² *Greenwald v. M. H. & O. R. R.*, 49 Mich. 197, 8 Am. & Eng. R. R. Cas. 133.

³ *P., C. & St. L. Ry. v. Ranney*, 37 Ohio St. 665, 5 Am. & Eng. R. R. Cas. 533; *P., F. W. & C. Ry. v. Lewis*, 33 Id. 196; *H. & T. C. R. R. v. Willie*, 53 Tex. 318; *Summerhays v. K. P. Ry.*, 2 Colo. 484; *N., C. & St. L. Ry. v. Wheless*, 10 Lea (Tenn.) 74; 4 Am. & Eng. R. R. Cas. 633, 15 Id. 315; *Smith v. M. & L. R. R.*, 18 Fed. Rep. 304; *I. C. R. R. v. Keen*, 72 Ill. 512; *Sherman v. R. & S. R. R.*, 17 N. Y. 153; *Wilson v. M. & P. Ry.*, 18 Ind. 226.

⁴ *Bull v. M. & M. Ry.*, 67 Ala. 206.

⁵ *Holden v. F. R. R.*, 129 Mass. 268, 2 Am. & Eng. R. R. Cas. 94.

⁶ *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140; *C. & X. R. R. v. Webb*, 12 Ohio St. 475; *L. M. R. R. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. R. R. Cas. 578; *Mackin v. B. & A. R. R.*, 135 Mass. 201, 15 Am. & Eng. R. R. Cas. 196; *N., C. & St. L. Ry. v. Foster*, Tenn. , 11 Am. & Eng. R. R. Cas. 180.

⁷ *Greenwald v. M., H. & O. R. R.*, 49 Mich. 197, 8 Am. & Eng. R. R. Cas. 133.

⁸ *Robertson v. T. H. & I. R. R.*, 78 Ind. 77, 8 Am. & Eng. R. R. Cas. 175.

⁹ *Rains v. St. L., I. M. & S. Ry.*, 71 Mo. 164.

¹⁰ *Slattery v. T. & W. Ry.*, 23 Ind. 81.

¹¹ *Whitman v. W. & M. Ry.*, 58 Wisc. 408, 12 Am. & Eng. R. R. Cas. 214.

¹² *C. C. R. R. v. Martin*, 7 Colo., 17 Am. & Eng. R. R. Cas. 592.

¹³ *Gibson v. N. C. Ry.*, 22 Hun 289.

¹⁴ *Lovegrove v. L., B. & S. C. Ry.*, 16 C. B. N. S. 669, 111 E. C. L.

¹⁵ *Ryan v. C. V. R. R.*, 23 Penna. St., 384; *Kumler v. J. R. R.*, 33 Ohio St. 150; *Fitzpatrick v. N. A. & S. R. R.*, 7 Ind. 436; *O. & M. Ry. v. Tindall*, 13 Ind. 366; *C. & A. R. R. v. Keefe*, 47 Ill. 108; *Capper v. L. E. & St. L. R. R.*,

fireman, or stoker, of engine;¹ labourers and road master;² labourer and section foreman;³ labourer and engine-driver of steam shovel;⁴ assistant yard master and yard master;⁵ yard master and general traffic manager of the line;⁶ yard hand and foreman of yard hands;⁷ night watchmen of tracks in yard and yard hands;⁸ foreman of a wrecking crew and engine-drivers of colliding trains;⁹ conductor of a construction train and train hands of a passenger train on which he was journeying to join his train;¹⁰ carpenters, or car repairers, and hands in yard employed in shifting trains;¹¹ carpenters, or car repairers, and train hands;¹² yard master

103 Ind. 305, 21 Am. & Eng. R. R. Cas. 525; *H. & T. C. Ry. v. Rider*, 62 Tex. 267, 21 Am. & Eng. R. R. Cas. 583, note; *Rohrback v. P. R. R.*, 43 Mo. 187; *P. R. R. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. R. Cas. 187; *Weger v. P. R. R.*, 55 Penna. St. 460; *Henry v. S. I. R. R.*, 81 N. Y. 373, 2 Am. & Eng. R. R. Cas. 60; *Gormley v. O. & M. Ry.*, 72 Ind. 31, 5 Am. & Eng. R. R. Cas. 581; *Collins v. St. P. & S. C. R. R.*, 30 Minn. 31, 8 Am. & Eng. R. R. Cas. 150; *Tunney v. M. Ry.*, L. R. 1 C. P. 291; *Blake v. M. C. R. R.*, 70 Me. 60; *I. C. R. R. v. Cox*, 21 Ill. 20; *St. L. & S. E. Ry. v. Britz*, 72 Id. 256; *Coon v. S. & U. R. R.*, 5 N. Y. 492; *Foster v. M. C. R. R.*, 14 Minn. 360; *Dallas v. G. C. & S. F. R. R.*, 61 Tex. 196, 21 Am. & Eng. R. R. Cas. 575; *St. L., I. M. & S. R. R. v. Shackelford*, 42 Ark. 417; *Howland v. M., L. S. & W. Ry.*, 54 Wisc. 226, 5 Am. & Eng. R. R. Cas. 578; *Copper v. L. E. & St. L. Ry.*, Ind. , 22 Am. & Eng. R. R. Cas. 277.

¹ *Whaalen v. M., R. & L. E. Ry.*, 8 Ohio St. 249.

² *Brown v. W. & St. P. R. R.*, 27 Minn. 162.

³ *Brick v. R. N. Y. & P. R. R.*, 98 N. Y. 212; *Barringer v. D. & H. C. Co.*, 19 Hun 216; *Hoke v. St. L., K. C. & N. Ry.*, 11 Mo. App. 575; *Willis v. O. R. v. & N. Co.*, 11 Oregon 257, 17 Am. & Eng. R. R. Cas. 539; *Peschel v. C. M. & St. P. Ry.*, 62 Wisc. 338, 17 Am. & Eng. R. R. Cas. 545.

⁴ *Thompson v. C. M. & St. P. Ry.*, 18 Fed. Rep. 239.

⁵ *McCosker v. L. I. R. R.*, 84 N. Y. 77, 5 Am. & Eng. R. R. Cas. 567.

⁶ *Conway v. B. & N. C. Ry.*, 9 Irish C. L. 498.

⁷ *Fraker v. St. P., M. & M. Ry.*, 32 Minn. 54, 15 Am. & Eng. R. R. Cas. 256.

⁸ *C. & E. R. R. v. Geary*, 110 Ill. 383, 18 Am. & Eng. R. R. Cas. 606.

⁹ *Abend v. T. H. & I. Ry.*, 111 Ill. 202, 17 Am. & Eng. R. R. Cas. 614.

¹⁰ *Manville v. C. & T. R. R.*, 11 Ohio St. 417.

¹¹ *Morgan v. V. of N. Ry.*, L. R. 1 Q. B. 149; *Gilman v. E. R. R.*, 10 Allen 233, 13 Id. 433; *Valtez v. O. & M. Ry.*, 85 Ill. 500; *C. & A. R. R. v. Murphy*, 53 Ill. 336.

¹² *Gilshannon v. C. B. R. R.*, 10 Cush. 228; *Seaver v. E. & M. R. R.*, 14 Gray 466; *Besel v. N. Y. C. & H. R. R. R.*, 70 N. Y. 171.

and train hands;¹ machinist in repair shop and boiler makers in same shop;² yard hands and driver of switching engine;³ surveying engineer and conductor of train on which he was carried to his place of work;⁴ yard hands and their foreman.⁵

325. It has been held that the following classes of servants are not fellow-servants, the injured servant being named first and the servant whose negligence caused the injury being named last: engine-driver and conductor,⁶ train hands, including engine-driver and fireman, and servants charged with the duty of constructing and maintaining in repair line, rolling stock, and appliances;⁷ train hands and inspector of car repairs;⁸ train hands, or guards, and labourers on line;⁹

¹ *Besel v. N. Y. C. & H. R. R.*, 70 N. Y. 171; *Valtez v. O. & M. Ry.*, 85 Ill. 500.

² *Murphy v. B. & A. R. R.*, 88 N. Y. 146, 8 Am. & Eng. R. R. Cas. 510.

³ *Fowler v. C. & N. W. Ry.*, 61 Wisc. 159, 17 Am. & Eng. R. R. Cas. 536.

⁴ *Ross v. N. Y. C. & H. R. R.*, 74 N. Y. 617.

⁵ *Fraker v. St. P., M. & M. Ry.*, 32 Minn. 54, 15 Am. & Eng. R. R. Cas. 256.

⁶ *L. M. R. R. v. Stevens*, 20 Ohio 415; *Chamberlin v. M. & M. R. R.*, 11 Wisc. 238; *C. M. & St. P. Ry. v. Ross*, 112 U. S. 376.

⁷ *A. T. & S. F. R. P. v. Moore*, 29 Kans. 632, 11 Am. & Eng. R. R. Cas. 243, 31 Kans. 197, 15 Am. & Eng. R. R. Cas. 312; *H. & T. C. Ry. v. Marcelles*, 59 Tex. 334, 12 Am. & Eng. R. R. Cas. 231; *Gilmore v. N. P. Ry.*, 18 Fed. Rep. 866, 15 Am. & Eng. R. R. Cas. 304; *Ford v. F. R. R.*, 110 Mass. 241; *Hough v. T. & P. Ry.*, 100 U. S. 213; *Fuller v. Jewett*, 80 N. Y. 46; *P. & N. Y. C. R. R. v. Leslie*, 16 Weekly Notes of Cases (Penna.) 321; *Lawless v. C. R. R. R.*, 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; *T. W. & W. Ry. v. Ingraham*, 77 Ill. 309; *Davis v. C. V. R. R.*, 55 Vt. 84, 11 Am. & Eng. R. R. Cas. 173; *Ryan v. C. & N. W. Ry.*, 60 Ill. 171.

⁸ *Cooper v. P., C. & St. L. R. R.*, 24 W. Va. 37, 21 Am. & Eng. R. R. Cas. 564 note; *Schultz v. C. M. & St. P. Ry.*, 48 Wisc. 375; *M. P. Ry. v. Condon*, 78 Mo. 567, 17 Am. & Eng. R. R. Cas. 583; *Long v. P. Ry.*, 65 Mo. 225; *King v. M. Ry.*, 14 Fed. Rep. 277, 8 Am. & Eng. R. R. Cas. 119; *Brann v. C. R. I. & P. Ry.*, 53 Iowa 595; *Tierney v. M. & St. L. Ry.*, 33 Minn. 311, 21 Am. & Eng. R. R. Cas. 545.

⁹ *Lewis v. St. L. & I. M. R. R.*, 59 Mo. 495; *Hall v. M. P. Ry.*, 74 Id. 298, 8 Am. & Eng. R. R. Cas. 106; *Moon v. R. & A. R. R.*, 78 Va. 745, 17 Am. & Eng. R. R. Cas. 531.

train hands, or guards, and the conductor of their train;¹ train hands, or guards, and labourers on the line;² section foreman and engine-driver of train,³ helper in machine shop and the workman whom he is employed to help,⁴ car repairer and his foreman,⁵ labourer and train dispatcher,⁶ labourer and engine-driver,⁷ labourer and foreman acting as conductor of a construction train,⁸ labourer and section boss,⁹ and labourer and fireman, or stoker.¹⁰

326. The rule of law, that a master is not liable to a servant for injuries caused by the negligence of a fellow-servant in the course of their common employment, prevents a recovery by a volunteer injured while assisting the servant in his work, for the obvious reason that a stranger cannot, by volunteering his services and thereby exposing himself to danger, acquire any greater rights, nor impose any greater duty on the master, than would have been acquired by the one, or imposed upon the other, if the stranger had been hired as a servant.¹¹

¹ C. C. & C. Ry. v. Keary, 3 Ohio St. 201; Cowles v. R. & D. R. R., 84 N. C. 309, 2 Am. & Eng. R. R. Cas. 90; Moon v. R. & A. R. R., 78 Va. 745, 17 Am. & Eng. R. R. Cas. 531.

² Carroll v. N. & C. R. R., 6 Heisk. (Tenn.) 347.

³ Dick v. I. C. & L. R. R., 38 Ohio St. 389, 8 Am. & Eng. R. R. Cas. 101.

⁴ U. P. R. R. v. Fort, 17 Wall. 553.

⁵ L. S. & M. S. Ry. v. Lavallee, 36 Ohio St. 221, 5 Am. & Eng. R. R. Cas. 549; H. & St. J. R. R. v. Fox, 31 Kans. 587, 15 Am. & Eng. R. R. Cas. 325.

⁶ McKune v. C. S. R. R., Cal., 17 Am. & Eng. R. R. Cas. 589, 21 Id. 539.

⁷ L. & N. R. R. v. Collins, 2 Duvall 114; Dobbins v. R. & D. R. R., 81 N. C. 446; P., F. W. & C. Ry. v. Powers, 74 Ill. 341; Diek v. I. C. & L. R. R., 38 Ohio St. 389, 8 Am. & Eng. R. R. 101.

⁸ C. St. P., M. & O. R. R. v. Lundstrom, 16 Neb. 254, 21 Am. & Eng. R. R. Cas. 528.

⁹ L. & N. R. R. v. Bowler, 9 Heisk. (Tenn.) 866.

¹⁰ C. & N. W. Ry. v. Moranda, 93 Ill. 302.

¹¹ Degg v. M. Ry., 1 H. & N. 773; Potter v. Faulkner, 1 B. & S. 800, 101 E. C. L.; Everhart v. T. H. & I. R. R., 78 Ind. 292, 4 Am. & Eng. R. R. Cas. 599; Flower v. P. R. R., 69 Penna. St. 210; Sherman v. H. & St. J. R. R., 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589; Osborne v. K. & L. R. R., 68 Me. 49; Jewell v. G. T. Ry., 55 N. H. 84.

This rule has been held to bar recovery in the case of volunteers injured while assisting railway servants in turning a turn-table,¹ in setting a brake on a moving car,² in watering an engine,³ in adjusting the load on a freight car in motion,⁴ or in moving a crate of merchandise.⁵ On the other hand, it has been held that the rule does not bar recovery in the case of a passenger who, having alighted from the car of a street railroad after it had been derailed, and having assisted in putting it on the track, was, while climbing over the front dasher, injured by the negligent act of the driver in starting the horses;⁶ nor in the case of a passenger on a street car, who is injured while engaged, at the request of the driver, in assisting to shunt the car to a siding;⁷ but, as in the two last cited cases, the plaintiffs were injured by reason of their voluntary participation in the work of the servants of the railway, it would seem that the railway ought not to have been held liable for their injuries. The rule does not bar recovery by a passer-by, who, at the request of a servant, pauses to give his advice as to the work, but does not otherwise participate in its prosecution;⁸ nor by a passenger who, having rendered some assistance on a train to the railway servants, and, having resumed his place as a passenger, is subsequently injured by the negligence of a railway servant;⁹ nor by persons who are not volunteers, but who participate in the work of the railway for some purpose of common interest to themselves and the railway, as where con-

¹ Degg *v.* M. Ry., 1 H. & N. 773.

² Everhart *v.* T. H. & I. R. R., 78 Ind. 292, 4 Am. & Eng. R. R. Cas. 599.

³ Flower *v.* P. R. R., 69 Penna. St. 210.

⁴ Sherman *v.* H. & St. J. R. R., 72 Mo. 62, 4 Am. & Eng. R. R. Cas. 589.

⁵ Jewell *v.* G. T. Ry., 55 N. H. 84.

⁶ P. P. Ry. *v.* Green, 56 Md. 84, 6 Am. & Eng. R. R. Cas. 168.

⁷ McI. R. R. *v.* Bolton, 43 Ohio St. 224, 21 Am. & Eng. R. R. Cas. 501.

⁸ Cleveland *v.* Speyer, 16 C. B. N. S. 399, 111 E. C. L.

⁹ C. V. R. R. *v.* Myers, 55 Penna. St. 288.

signees assist in the reception of their freight;¹ nor by servants of another railway who have come upon the line, or premises, of the defendant railway in the performance of their duty to that other railway;² nor does the rule bar recovery in the case of a servant of a railway for injuries caused by the negligence of the servants of another railway in the exercise of running powers by the latter railway over the line of the first-mentioned railway;³ nor in the case of the servant of a connecting steamboat line, who is similarly injured;⁴ nor does the rule bar a recovery from the railway by a servaut for injuries caused to that servant's wife by the negligence of a fellow-servant.⁵ If the relation of service is terminated, the ex-servant is not barred from recovering for injuries caused by his late fellow-servants.⁶ A servant employed by the day, who is injured after he has finished his day's work, or at a time when he is not in the service, is no longer a fellow-servant of another servant by whose negligence he is injured, and can, therefore, recover from the master for injuries so received.⁷

¹ Holmes *v.* N. E. Ry., L. R. 4 Ex. 254, 6 Id. 123; Wright *v.* L. & N. W. Ry., L. R. 10 Q. B. 298, 1 Q. B. D. 252; Kelly *v.* Johnson, 128 Mass. 530.

² Vose *v.* L. & Y. Ry., 2 H. & N. 728; Warburton *v.* S. W. Ry., L. R. 2 Ex. 30; Swainson *v.* N. E. Ry., 3 Ex. Div. 341; Graham *v.* N. E. Ry., 18 C. B. N. S. 529, 114 E. C. L.; C. R. R. *v.* Armstrong, 49 Penna. St. 186, 52 Id. 282; P., W. & B. R. R. *v.* The State, to use of Bitzer, 58 Md. 372, 10 Am. & Eng. R. R. Cas. 792; Merrill *v.* C. V. R. R., 54 Vt. 200; Snow *v.* H. R. R., 8 Allen 441; see also Abraham *v.* Reynolds, 5 H. &, N. 142.

³ Smith *v.* N. Y. & H. R. R., 19 N. Y. 127.

⁴ Carroll *v.* M. V. R. R., 13 Minn. 30.

⁵ Gannon *v.* H. R. R., 112 Mass. 234.

⁶ Packet Co. *v.* McCue, 17 Wall. 508.

⁷ Baird *v.* Pettit, 70 Penna. St. 477; B. & O. R. R. *v.* The State, to use of Trainor, 33 Md. 542; Abell *v.* W. M. R. R., 63 Md. 433, 21 Am. & Eng. R. R. Cas. 503.

VIII. THE SERVANT'S CONTRIBUTORY NEGLIGENCE.

It is contributory negligence in a servant to continue work with incompetent servants, or with an insufficient number of servants, or with obviously defective machinery or appliances, or to carelessly expose himself to danger in the conduct of his work; but when the servant has complained to the proper officer of the defective apparatus, or of the negligent fellow-servant, or of the inadequacy in the number of servants, and he has been promised that the defect complained of shall be remedied, the servant is not contributorily negligent in continuing work, provided that the defect be not of such a character as to render continuance in the work obviously and unavoidably dangerous.

327. A servant cannot recover for injuries to which his own negligence has contributed in voluntarily continuing to work, either with incompetent fellow-servants;¹ or, with an insufficient number of fellow-servants;² or, with obviously defective machinery and appliances;³ or, under running arrangements of trains whereby the risk of injury to him is increased;⁴ or, in

¹ *Frazier v. P. R. R.*, 33 Penna. St. 104; *L. S. & M. S. Ry. v. Knittal*, 33 Ohio St. 468; *Kroy v. C. R. I. & P. Ry.*, 32 Iowa 357; cf. *Huey v. D. & B. J. Ry.*, 5 Irish C. L. 206.

² *Skip v. E. C. Ry.*, 9 Ex. 243; *C. & E. I. R. R. v. Geary*, 110 Ill. 383, 18 Am. & Eng. R. R. Cas. 606; *B. & O. R. R. v. State*, 41 Md. 268; *C. & N. W. Ry. v. Donahue*, 75 Ill. 106.

³ *Dynen v. Leach*, 26 L. J. Ex. 221; *Assop v. Yates*, 2 II. & N. 768; *Griffiths v. Gidlow*, 3 Id. 648; *Woodley v. M. D. Ry.*, 2 Ex. D. 384; *Marsden v. Haigh*, 14 Weekly Notes of Cases (Penna.) 526; *G. & C. Ry. v. Bresmer*, 97 Penna. St. 103; *P. & R. R. R. v. Schertle*, Id. 450, 2 Am. & Eng. R. R. Cas. 158; *Cooper v. Butler*, 103 Penna. St. 412; *C. & A. R. R. v. Munroe*, 85 Ill. 25; *Perigo v. C. R. I. & P. R. R.*, 52 Iowa 276; *Muldowney v. I. C. R. R.*, 39 Id. 615; *Kroy v. C. R. I. & P. R. R.*, 32 Id. 357; *Way v. I. C. R. R.*, 40 Id. 341; *Mansfield C. & C. Co. v. McEnery*, 91 Penna. St. 185; *Wanamaker v. Burke*, 17 Weekly Notes of Cases (Penna.) 225; *De Graff v. N. Y. C. & H. R. R. R.*, 76 N. Y. 125; *Hathaway v. M. C. R. R.*, 51 Mich. 253, 12 Am. & Eng. R. R. Cas. 249; *I. C. R. R. v. Jewell*, 46 Ill. 99; *Greenleaf v. I. C. R. R.*, 29 Iowa 14; *Greenleaf v. D. & S. C. R. R.*, 33 Iowa 52; *A. & C. A. L. R. R. v. Ray*, 70 Ga. 674, 22 Am. & Eng. R. R. Cas. 281; *Marsh v. Chickering*, 101 N. Y. 396.

⁴ *Robinson v. H. & T. C. Ry.*, 46 Tex. 540. See *Nelson v. C. M. & St. P. R. R.*, 60 Wisc. 320, 22 Am. & Eng. R. R. Cas. 391, as to the necessity of allowing

carelessly exposing himself to danger in the conduct of his work.¹ Thus, it has been held to be contributory negligence in a servant to ride on an engine when his duty does not require him to be there;² but it is, of course, not contributory negligence in a servant to ride on the engine when his duty requires him to be there, as, in the case of the chief brakeman of a freight train.³ It is not contributory negligence in a servant to ride in a baggage car, for that is not necessarily a position of danger.⁴ It has been held to be contributory negligence in an engine-driver to drive his engine at high speed over a defective roadbed whose defects are known to him;⁵ or, to drive his engine, after a storm, over a line which is liable to be obstructed by land slides or wash outs, at such a rate of speed that the engine cannot be stopped in time to avoid collision with an obstruction;⁶

to conductors and engine-drivers a reasonable opportunity for the examination and comprehension of changes in time-tables.

¹ Senior *v.* Ward, 1 El. & El. 385, 102 E. C. L.; Cooper *v.* Butler, 14 Weekly Notes of Cases (Penna.) 278; Payne *v.* Ross, 100 Penna. St. 301; Powers *v.* N. Y., L. E. & W. R. R., 98 N. Y. 274; (*sed cf.* E. T. V. & G. R. R. *v.* Smith, 9 Lea (Tenn.) 685); H. & T. C. Ry. *v.* Myers, 55 Tex. 110; Behrens *v.* K. P. Ry., 5 Colo. 400, 8 Am. & Eng. R. R. Cas. 184; Muldowney *v.* I. C. R. R., 39 Iowa 615; Wolsey *v.* L. S. R. R., 33 Ohio St. 227; Ferguson *v.* C. I. Ry., 58 Iowa 293; Lockwood *v.* C. & N. W. Ry., 55 Wisc. 50; Abend *v.* T. H. & I. Ry., 111 Ill. 202, 17 Am. & Eng. R. R. Cas. 614; Crutchfield *v.* R. & D. R. R., 78 N.C. 300; B. & O. R. R. *v.* Whittington, 30 Gratt. 805; Sammon *v.* N. Y. & H. R. R., 62 N. Y. 251; C. & A. R. R. *v.* Rush, 84 Ill. 570; Penna. Co. *v.* Lynch, 90 Ill. 333; Cunningham *v.* C. M. & St. P. Ry., 17 Fed. Rep. 882; Hallihan *v.* H. & St. J. R. R., 71 Mo. 113, 2 Am. & Eng. R. R. Cas. 117; Williams *v.* C. R. R., 43 Iowa 396; Hoven *v.* B. & M. R. R., 20 Iowa 562.

² Sprong *v.* B. & A. R. R., 58 N. Y. 56; O'Neill *v.* K. & D. M. Ry., 45 Iowa 546; Kresanowski *v.* N. P. Ry., 18 Fed. Rep. 229; B. & P. R. R. *v.* Jones, 95 U. S. 439; Smith *v.* M. & L. R. R., 18 Fed. Rep. 304; Abend *v.* T. H. & I. Ry., 111 Ill. 202, 17 Am. & Eng. R. R. Cas. 614; Doggett *v.* I. C. R. R., 34 Iowa 284.

³ Sprong *v.* B. & A. R. R., 58 N. Y. 56.

⁴ Washburn *v.* N. & C. R. R., 3 Head (Tenn.) 638.

⁵ M. & C. R. R. *v.* Thomas, 51 Miss. 637; I. C. R. R. *v.* Patterson, 69 Ill. 650, 93 Id. 290.

⁶ Sweeney *v.* M. & St. L. Ry., 33 Minn. 153, 22 Am. & Eng. R. R. Cas. 302.

or, to drive his engine over a switch at a rate in excess of that permitted by the regulations of the railway;¹ or, to drive his engine with an obviously defective boiler, under a pressure of steam in excess of the amount permitted by the regulations of the line;² but it has been held not to be necessarily contributory negligence in an engine-driver to run his engine with ordinary care on a line which he knows to be somewhat out of repair, but as to whose specific defects he has no information;³ nor, is it necessarily contributory negligence in the engine-driver of a train which is behind time, to drive his engine at a greater than schedule rate of speed when approaching a switch at the entrance to a railway yard.⁴

328. It is contributory negligence in a servant to unnecessarily go upon or cross the line, without exercising care for his safety;⁵ but it is not necessarily contributory negligence in a servant to go on the line in the course of duty in the way of a moving train, if he has reason to believe that the train will be brought to a stop before reaching him;⁶ or, to pick up a coupling pin from the track before a slowly moving train, when he has signalled the engine-driver to stop.⁷ In some cases it is held, following the doctrine of *Davies v. Mann*, that even if a servant be contributorily negligent in going upon the line or between the cars, and is

¹ *M. & C. R. R. v. Thomas*, 51 Miss. 637; *G. R. R. & B. Co. v. Oaks*, 52 Ga. 410.

² *Hubgh v. N. O. & C. R. R.*, 6 La. An. 495.

³ *Mehan v. S. B. & N. Y. R. R.*, 73 N. Y. 585; *Hawley v. N. C. Ry.*, 82 Id. 370, 2 Am. & Eng. R. R. Cas. 248; *Dale v. St. L., K. C. & N. Ry.*, 63 Mo. 455.

⁴ *Penn. Co. v. Roney*, 89 Ind. 453, 12 Am. & Eng. R. R. Cas. 223.

⁵ *Maher v. A. & P. R. R.*, 64 Mo. 267; *Holland v. C. M. & St. P. Ry.*, 18 Fed. Rep. 243; *Boldt v. N. Y. C. R. R.*, 18 N. Y. 432; *contra*, *Farley v. C. R. I. & P. Ry.*, 56 Iowa 337, 2 Am. & Eng. R. R. Cas. 108; *Behrens v. K. P. Ry.*, 5 Colo. 400, 8 Am. & Eng. R. R. Cas. 184; *Clark v. B. & A. R. R.*, 128 Mass. 1, 1 Am. & Eng. R. R. Cas. 134.

⁶ *Steele v. C. R. R.*, 43 Iowa 109.

⁷ *Steele v. C. R. R.*, 43 Iowa 109.

injured by the negligence of fellow-servants, who know of his danger, and who, by the exercise of care, could avoid injuring him, the railway is liable to him for such injury.¹ It is contributory negligence in a servant to unnecessarily get on or off moving engines or cars;² but it is not contributory negligence in a servant to jump from a moving train in order to avoid an apparent danger, such as an imminent collision;³ and in any such case, it is for the jury to decide whether or not the act of the person injured was, under the circumstances, prudent.⁴ It is contributory negligence in a servant to stand on an axle-box of a car in motion;⁵ or to sit upon a platform car in motion with his feet hanging over the side of the car;⁶ or to unnecessarily project his body from the door of a baggage car in motion, so that it comes into contact with a bridge support.⁷

329. It is contributory negligence in a servant to couple cars in an unnecessarily dangerous manner,⁸ but

¹ B. & O. R. R. v. The State, 33 Md. 542; Romick v. C., R. I. & P. Ry., 62 Iowa 627, 15 Am. & Eng. R. R. Cas. 288.

² Cunningham v. C., M. & St. P. Ry., 17 Fed. Rep. 882; Dowell v. V. & M. R. R., 61 Miss. 519, 18 Am. & Eng. R. R. Cas. 42; Timmon v. C. O. R. R., 6 Ohio St. 105.

³ C. R. R. & B. Co. v. Rhodes, 56 Ga. 645.

⁴ C. R. R. v. Roach, 64 Ga. 635, 8 Am. & Eng. R. R. Cas. 79.

⁵ Martensen v. C., R. I. & P. Ry., 60 Iowa 705, 11 Am. & Eng. R. R. Cas. 233.

⁶ St. L. & S. F. R. R. v. Marker, 41 Ark. 542; cf. Pool v. C., M. & St. P. Ry., 53 Wisc. 657, 3 Am. & Eng. R. R. Cas. 332.

⁷ Jones v. L. R. R., Ky., 22 Am. & Eng. R. R. Cas. 295, note; cf. H. & T. C. R. R. v. Hampton, 64 Tex. 427, 22 Am. & Eng. R. R. Cas. 291.

⁸ C. & A. R. R. v. Rush, 84 Ill. 570; Muldowney v. I. C. R. R., 39 Iowa 615; Lockwood v. C. & N. W. Ry., 55 Wisc. 50, 6 Am. & Eng. R. R. Cas. 151; T., W. & W. Ry. v. Blaek, 88 Ill. 112; Foster v. C. & A. R. R., 84 Ill. 164; Penna. Co. v. Hankey, 93 Ill. 580; Williams v. C. R. R., 43 Iowa 396; P. & R. R. R. v. Schertle, 97 Penna. St. 450, 2 Am. & Eng. R. R. Cas. 158; M. P. Ry. v. Lyde, 57 Tex. 505, 11 Am. & Eng. R. R. Cas. 188; Ferguson v. C. I. Ry., 58 Iowa 293, 5 Am. & Eng. R. R. Cas. 614; Hulett v. St. L., K. C. & N. R. R., 67 Mo. 239.

it is not necessarily contributory negligence in a train hand to go between cars for the purpose of coupling them without first examining the draw-bars in order to see that they are properly adjusted, for every servant is entitled to assume that the instrumentalities of work provided by the master are in good order.¹ Nor, if cars are moving at a high rate of speed, and the brakeman has signalled the engine-driver to slow up, is it contributory negligence in the brakeman, in reliance on the engine-driver's compliance with his request, to go between the cars for the purpose of coupling them;² nor is it necessarily contributory negligence in a brakeman to stand facing the draw-bar while coupling;³ nor is it necessarily contributory negligence in a train hand to step, while his train is in motion, from the top of one car to another;⁴ nor to jump from the top of a freight car to the tender rather than to climb down the ladder at the side of the car.⁵

330. It is contributory negligence in a servant to lie down to sleep on the floor of a round-house so near the track that in turning over in his sleep he puts his leg on the track, where it is run over by an engine when backed into its stall,⁶ or to travel on the line in a hand car when a train is known by the injured servant to be due,⁷ or to travel on the line in a hand car unprotected

¹ King *v.* O. R. R. (U. S. C. C. Ind.), 8 Am. & Eng. R. R. Cas. 119; Russell *v.* M. & St. L. R. R., 32 Minn. 230.

² Beems *v.* C. R. I. & P. Ry., 58 Iowa 150, 10 Am. & Eng. R. R. Cas. 658; Snow *v.* H. R. R., 8 Allen 441.

³ Belair *v.* C. & N. W. Ry., 43 Iowa 662.

⁴ A., T. & S. F. R. R. *v.* McCandliss, 33 Kans. 366, 22 Am. & Eng. R. R. Cas. 296.

⁵ Whitsett *v.* C., R. I. & P. Ry., Iowa , 22 Am. & Eng. R. R. Cas. 336.

⁶ Price *v.* H. & St. J. R. R., 77 Mo. 508, 15 Am. & Eng. R. R. Cas. 168.

⁷ Burling *v.* I. C. R. R., 85 Ill. 18; I. C. R. R. *v.* Modglin, Id. 481; *sed cf.* Campbell *v.* C., R. I. & P. Ry., 45 Iowa 76; McKune *v.* C. S. R. R., Cal. 17 Am. & Eng. R. R. Cas. 589.

by flagging in advance, the regulations of the railway having notified the servant that special trains may be expected at any time,¹ or to stand so near to the line as to be struck by a passing car,² or to use a temporary platform of pine wood as a bridge in moving heavy freight from one car to another when a stronger platform was available,³ or to neglect to keep wet the rope of the derrick with which he is working,⁴ or to unnecessarily mount on an engine on a turn-table,⁵ or to knowingly disobey the regulations of the railway, which, if obeyed, would have prevented the injury,⁶ or to attempt, in coupling moving cars, to pass round the end of a freight car which was not equipped with end ladders, platforms, steps, or handles,⁷ or to ride on the top of a car where the servant's duty does not require him to put himself in that exposed position,⁸ but it is not necessarily contributory negligence in a freight brakeman to climb to the top of a moving car in a railway yard for the purpose of braking it, and thus averting an impending collision with another car.⁹

331. It is not under all circumstances contributory negligence in a servant to expose himself to a danger which he could avoid; for instance, an engine-driver is not bound to desert his post on the engine, in order to

¹ McGrath *v.* N. Y. & N. E. R. R., Mass. , 18 Am. & Eng. R. R. Cas. 5.

² B. & O. R. R. *v.* Whittington, 30 Grat. (Va.) 805.

³ Penna. Co. *v.* Lynch, 90 Ill. 333.

⁴ U. P. Ry. *v.* Fray, 31 Kans. 739, 15 Am. & Eng. R. R. Cas. 158.

⁵ E. T. V. & G. R. R. *v.* Toppins, 10 Lea (Tenn.) 58, 11 Am. & Eng. R. R. Cas. 222.

⁶ Lyon *v.* D. L. & L. M. Ry., 31 Mich. 429; G. R. R. & B. Co. *v.* McDade, 59 Ga. 73, 60 Id. 119; Wolsey *v.* L. S. & M. S. Ry., 33 Ohio St. 227.

⁷ C. B. & Q. R. R. *v.* Warner, 108 Ill. 538, 18 Am. & Eng. R. R. Cas. 100.

⁸ P. & C. R. R. *v.* Sentmayer, 92 Penna. St. 276; Gibson *v.* E. Ry., 63 N. Y. 449.

⁹ Kelley *v.* C. M. & St. P. Ry., 50 Wisc. 381, 2 Am. & Eng. R. R. Cas. 65.

escape an impending collision;¹ but a servant is contributorily negligent when he exposes himself to a danger which he could avoid without neglecting his duty by the exercise of reasonable care for his own safety. If, however, the danger be not so great, nor so imminent, that a man of ordinary prudence would refuse to encounter it in the performance of his duty, the servant who voluntarily incurs that danger is not necessarily contributorily negligent.² It may also be said that when a servant is injured by reason of his presence in a position of danger, the burden of proof is on him to show that his duty to the railway requires him to place himself in that position.³

332. The general doctrine as to the effect of a servant's contributory negligence in barring his recovery is well illustrated by *Cunningham v. C., M. & St. P. Ry.*,⁴ where a mother having brought suit to recover for the death of her son, a yardman, who was killed in attempting to step on the rear foot-board of a switching engine which was backing towards him, Miller, J., after referring to the obligation on the part of the railway to exercise care in providing the instrumentalities of labour, added, "a man has no right to thrust himself forward into a dangerous position and say, 'if I am killed, somebody will get damages for it,' or, 'if I am hurt, I shall go to the hospital and be taken care of and recover damages.' He has got to take care of himself, as well as the railroad to take care of their duties and their employés. These obligations are mutual, and it

¹ *Cottrill v. C., M. & St. P. Ry.*, 47 Wisc. 634; *Penna. Co. v. Roney*, 89 Ind. 453, 12 Am. & Eng. R. R. Cas. 223.

² *Stoddard v. St. L., K. C. & N. Ry.*, 65 Mo. 514; *C. C. R. R. v. Ogden*, 3 Colo. 499.

³ *C. R. R. v. Sears*, 61 Ga. 279; *A. & C. A. L. R. R. v. Ray* 70 Ga. 674, 22 Am. & Eng. R. R. Cas. 281.

⁴ 17 Fed. Rep. 882, 12 Am. & Eng. R. R. Cas. 217.

is the law that if a man voluntarily puts himself in a dangerous position—does so unnecessarily when there are other positions in connection with the discharge of his duty which are safe, which he can be placed in,—he cannot recover of the railroad company in damages for that injury to which he has contributed by his own negligence. That is the law. It is your duty to regard it, and you have no right to say, that, because this railroad company is a great and powerful instrumentality, it must pay for this man's life, whether he was negligent, or careless, or not." The jury having found a verdict for the plaintiff, Miller, J., promptly set the verdict aside.

333. It is not necessarily contributory negligence in a servant to expose himself to risk of injury in the performance of his duty, where the circumstances are not such as to afford to the servant an opportunity of estimating the amount of risk incurred; thus, in *Lawless v. C. R. R. R.*,¹ where a railway was held liable to a servant injured in coupling an engine to a car by reason of the draw-bar of the engine being so low that it passed under the bunter of the car, Colt, J., said: "the fact that a person voluntarily takes some risk is not conclusive evidence, under all circumstances, that he is not using due care.² The plaintiff was engaged in performing the duty required of him, and it was necessary that the cars should be moved quickly to make way for an expected train. * * * The question of his due care depended, to some extent, upon the view that the jury might take of his necessity for immediate action, the distance the bunters would have to pass each other before the car and engine would come so near together as to injure him, the speed at which the engine was mov-

¹ 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96.

² *Thomas v. W. U. T. Co.*, 100 Mass. 156; *Mahoney v. M. R. R.*, 104 Id. 73

ing, the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance he was reasonably entitled to place upon his ability to make the connection so as to prevent the bunters passing, and probably other circumstances.”¹

334. The fact that a servant is ordered by his superior officer to do an act that is obviously dangerous, and which when done was the cause of injury to the servant will not render the railway liable for that injury, as, for instance, where the foreman of a construction train ordered a servant to jump from a station platform upon a moving car;² nor is the railway to be held liable where a servant is injured by the negligence of fellow-servants while he is doing an act of apparent danger in obedience to the orders of his superior officer, as, for instance, where a labourer was injured in getting upon a moving car under the order of his foreman, the engine-driver negligently increasing the speed of the train with a jerk and thus throwing the labourer under the train;³ nor is the railway liable to a servant who is injured in obeying the orders of an officer who has no rightful authority to command, as, for instance, where a bridge watchman was injured while working to clear a tunnel of fallen rock under the orders of a servant, who was charged with the duty of looking after killed stock.⁴

335. When the servant has complained to the proper officer either of the defective apparatus or of the negligent fellow-servant, and that officer promises to remedy the defect, or to discharge the negligent fellow-servant,

¹ See also *Pringle v. C., R. I. & P. Ry.*, 64 Iowa 613, 18 Am. & Eng. R. R. Cas. 91.

² *Cassidy v. M. C. R. R.*, 76 Me. 488, 17 Am. & Eng. R. R. Cas. 519.

³ *Capper v. L. E. & St. L. R. R.*, 103 Ind. 305, 21 Am. & Eng. R. R. Cas. 525.

⁴ *N. & C. R. R. v. McDaniel*, 12 Lea (Tenn.) 386, 17 Am. & Eng. R. R. Cas. 604.

and the servant in reliance upon the fulfillment of the promise continues in the work, and that defect in the apparatus, or that negligence of the fellow-servant, is not of such a character as to render it unavoidably dangerous to continue the work, such continuance in work is not contributory negligence on the part of the injured servant; and, of course, in the service of a railway, it is sufficient that the complaint be made to, and the remedy be promised by that officer who is charged with the duty in the one case, of ordering the repair of defects of the character complained of, and in the other case of discharging negligent servants;¹ but if the danger of using the particular machinery or appliance, or of performing the particular service be so obviously great that a person of ordinary prudence would not continue to take the risk, the injured servant cannot recover, although he acted under the express order of his foreman or other superior officer.²

IX. STATUTES AFFECTING THE LIABILITY OF RAILWAYS TO THEIR SERVANTS.

336. In some jurisdictions the rules of law affecting the liability of railways to their servants have been materially modified by statutes. In England, under the Employers' Liability Act, 1880, 43 & 44 Vict. c. 42, there is a statutory liability, with summary remedies,

¹ Holmes *v.* Clark, 6 H. & N. 349, 7 Id. 937; Ford *v.* F. R. R., 110 Mass. 261; Lanning *v.* N. Y. C. R. R., 49 N. Y. 521; Patterson *v.* P. & C. R. R., 76 Penna. St. 389; LeClair *v.* St. P. & P. R. R., 20 Minn. 9; Brabbits *v.* R. W. Ry., 38 Mo. 289; Belair *v.* C. & N. W. R. R., 43 Iowa 663; Hough *v.* T. & P. Ry., 100 U. S. 213; Conroy *v.* V. Iron Works, 62 Mo. 35; Hawley *v.* N. C. Ry., 82 N. Y. 370, 2 Am. & Eng. R. R. Cas. 247; S. C. & P. Ry. *v.* Finlayson, Neb. , 18 Am. & Eng. R. R. Cas. 68; K. C., St. J. & C. B. R. R. *v.* Flynn, 78 Mo. 195, 18 Am. & Eng. R. R. Cas. 23; Miller *v.* U. P. Ry., 12 Fed. Rep. 600; E. T. V. & G. R. R. *v.* Duffield, 12 Lea (Tenn.) 63, 18 Am. & Eng. R. R. Cas. 35.

² Baker *v.* W. & A. R. R., 68 Ga. 699; District of Columbia *v.* McElligott, 117 U. S. 621.

imposed under certain restrictions upon masters in the cases of injuries to servants resulting, *inter alia*, from the negligence of persons entrusted with a superintendence of the work, and of persons to whose orders or directions the workman at the time of the injury was bound to conform, and, in the cases of railways, of any person "in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train." This Act is to continue in force until December 31, 1887, and to the end of the then next session of Parliament. In *Griffiths v. The Earl of Dudley*,¹ Cave, J., said: "the Employers' Liability Act was passed to remove the difficulty arising from the decision in *Wilson v. Merry*.² The effect of it is that the workman may bring his action in five specified cases, and the employer shall not be able to say in answer that the plaintiff occupied the position of workman in his service, and must, therefore, be taken to have impliedly contracted not to hold the employer liable. In other words, the legal result of the plaintiff being a workman shall not be that he has impliedly contracted to bear the risks of the employment."

337. In Georgia, Iowa, Kansas, Mississippi, Montana, Rhode Island, Wisconsin, and Wyoming, railways are by statute made liable to their servants for any neglect or mismanagement by their agents, engineers, or other employés.³ The Iowa statute provides that "every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence of any negligence of the agents, or by the mismanagement of the engineers or other

¹ 9 Q. B. D. 366.

² L. R. 1 H. L. Sc. 326.

³ C. R. R. v. Mitchell, 63 Ga. 173; *Gumz v. C. M. & St. P. Ry.*, 52 Wise. 672; *U. T. Co. v. Thomason*, 25 Kans. 1; *M. P. Ry. v. Haley*, Id. 35; *Schroeder v. C. R. I. & P. R. R.*, 41 Iowa 344, 47 Id. 375; *Deppe v. Same*, 36 Id. 52; *Lombard v. Same*, 47 Id. 494; *Frandsen v. Same*, 36 Id. 372.

employés of the corporation to any person sustaining such damage, all contracts to the contrary notwithstanding." The constitutionality of this Act has been sustained in *Rose v. D. M. R. R.*¹ The statutes in the other States are of similar import.²

¹ 39 Iowa 246.

² See notes to *K. P. Ry. v. Peavey*, 11 Am. & Eng. R. R. Cas. 260.

BOOK IV.

THE REMEDY.

CHAPTER I.

THE FORM OF THE ACTION.

- I. When the remedy is by action at law and when by suit in equity.
- II. When an action of trespass will lie.
- III. The distinction between case and assumpsit.
- IV. The joinder of common law and statutory claims.
- V. Payment of money into court.

**I. WHEN THE REMEDY IS BY ACTION AT LAW, AND WHEN
BY SUIT IN EQUITY.**

The remedy is by action at law, excepting in those cases where the injury has been done in the operation of a line by a receiver appointed by a court of equity, and the court has refused to the plaintiff leave to sue its receiver at law; in such a case the plaintiff's only remedy is in equity.

338. The remedy of the injured party is by an action at law, excepting in those cases where the injury has been done in the operation of a railway by a receiver acting under the order of a court of equity, and the court has refused to the plaintiff leave to bring his action at law; in such a case the only remedy of the plaintiff is to present his claim on the fund in the receiver's hands at the audit of the receiver's accounts, for it must be remembered that a receiver, as an officer of the court appointing him, is only suable by its permission.¹

¹ Barton *v.* Barbour, 104 U. S. 135; Klein *v.* Jewett, 26 N. J. Eq. 474.

The distinction between actions sounding in tort and actions sounding in contract is in theory only formal, but in practice the distinction is material.

339. English lawyers, following in the footsteps of the civil law, have drawn a sharp distinction between actions sounding in tort and in contract, yet, as Mr. Robert Campbell has pointed out,¹ this distinction is in theory only formal, for all actions at law are grounded upon the breach of a duty. That duty may have been imposed upon the railway, either by its contract with the plaintiff, or by reason of the relation in which the plaintiff stands to it. In the former case the plaintiff's right of action may be said to arise *ex contractu*, and in the latter case *ex delicto*, but in either case the plaintiff's right to recover is necessarily based upon the railway's breach of duty to him; yet, in jurisdictions where the common law rules of pleading and practice have not been materially departed from, the form in which the plaintiff brings his action may control the amount of his damages, or even affect his right to recover.

II. TRESPASS.

The railway is liable in trespass only for injuries wilfully inflicted by its express authority or subsequently ratified.

340. To render a railway liable in trespass for personal injuries, it is incumbent upon the plaintiff to show that the injury was wilfully inflicted by an agent, or servant, of the railway, and that the act which caused the injury was expressly directed, or subsequently ratified, by the corporation.² A railway company can act only by its agents, or servants. When, therefore, a plain-

¹ Treatise on the Law of Negligence 12.

² Gregory v. Piper, 9 B. & C. 591, 17 E. C. L.; Yerger v. Warren, 31 Penna. St. 319; McLaughlin v. Pryor, 4 M. & G. 48, 43 E. C. L.; Gordon v. Rolt, 4 Ex. 364.

tiff has been injured, that injury, in almost every conceivable case, has resulted, not from the exercise of wilful force upon the part of the defendant company, nor by the action of its agents and servants in obedience to orders, or express instructions, but from the negligence of those agents or servants. If the driver of an engine were, under the express instructions of an executive officer of the corporation, to run down a person, or an animal, upon the line, or if, in obedience to the same authority, the train hands were forcibly to eject a passenger from the train, the corporation would be liable in trespass. In the leading case of *Scott v. Shepherd*,¹ the defendant was held liable to the plaintiff in trespass, because, by wantonly throwing the squib, he was held to have intended all the consequences that followed upon the original throwing. As Tilghman, C. J., said in *Smith v. Rutherford*:² "the criterion of trespass is force directly applied." Therefore, to render a defendant liable in trespass, the act which injured the plaintiff must have been done either personally by the defendant, or by the defendant's servants, under his express instructions. In *Gregory v. Piper*,³ the defendant, in order to obstruct a right of way claimed by the plaintiff, had directed his servant to pile rubbish on his premises near to, but not touching, the plaintiff's wall. The servant did the work carefully, but some of the rubbish naturally ran against the wall. It was held that the defendant was liable in trespass, Littledale, J., saying: "if the servant, therefore, in carrying into execution the orders of his master, uses ordinary care and an injury is done to another, the master is liable in trespass. If the injury arises from the want of ordinary care, and an injury is done to another, the master is

¹ 2 W. Bl. 892, 1 Sm. L. C. 549.

² 2 S. & R. 360.

³ 9 B. & C. 591, 17 E. C. L.

liable in case." In *Yerger v. Warren*,¹ the facts were almost identical with those in *Gregory v. Piper*, and judgment for the plaintiff in the court below was reversed in the Supreme Court, because the judge at the trial had directed the jury that the relation of master and servant rendered the defendant liable in trespass, whereas the jury should have been instructed that, unless the wrong complained of had been done by the defendant's order, he could not be liable for the trespass. In *McLaughlin v. Pryor*,² the defendant sitting in his carriage had directed his postilion to drive into a line of carriages under such circumstances that his carriage necessarily collided with the plaintiff's carriage. It was held that he was liable to the plaintiff in trespass. In *Gordon v. Rolt*,³ the defendant was a contractor, whose servants, without his authority, broke the plaintiff's crane; it was held that the defendant was not liable, Parke, B., saying: "the result of the authorities is, that if a servant in the course of his master's employ drives over any person and does a wilful injury, the servant, and not the master, is liable in trespass; if the servant by his negligent driving causes an injury, the master is liable in case. If the master himself is driving, he is liable in case for his negligence, or in trespass because the act was wilful." In *P. G. & N. R. R. v. Wilt*,⁴ the defendant's train at a highway crossing struck the plaintiff's wagon and injured it. Verdict and judgment for the plaintiff in trespass was reversed, Rogers, J., saying: "A master is not liable, either in trespass, or in case, for the wilful act of his servant, as by driving his master's carriage against another without his direction, or assent. But he is liable to answer for any damage arising to another from the negligence, or unskilfulness,

¹ 31 Penna. St. 319.

² 4 M. & G. 48, 43 E. C. L.

³ 4 Ex. 364.

⁴ 4 Whart. 143.

of his servant acting in his employ. * * * * * The authorities are uniform that case, not trespass, is the proper remedy." *Sharrod v. L. & N. W. Ry.*¹ is to the same point. There the plaintiff's sheep, through a defect in a fence, got upon the defendant's line, and were run over by an engine driven at the rate of speed allowed by the defendant's regulations. It was held that the plaintiff could not recover in trespass, Parke, B., saying, page 585: "The maxim *qui facit per alium facit per se*, renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the direct act of the servant the direct act of the master. * * * * * In all cases where the master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill, or care, of the agent, and no more." In *A. V. R. R. v. McLain*,² the plaintiff was wrongfully ejected by the defendant's conductor from a car, and it was held, reversing the court below, that the defendants were not liable in trespass for its servant's act done without its authority, assent, or even knowledge." *Drew v. Peer*³ maintains the converse of the proposition, for the plaintiff, having brought case against the defendant, the proprietor of a theatre, for his wrongful expulsion from a theatre, it was held that the act having been committed in the ordinary course of a servant's employment, but not by the express instructions of the defendant, the action was rightly case, and not trespass. So in *Holmes v. Mather*,⁴ where the defendant being driven by his servant, and not interfering with his servant's management, the horses ran away, and in turning a corner struck the plaintiff, it was held that case, not tres-

¹ 4 Ex. 580.

² 93 Penna. St. 234.

³ 91 Penna. St. 442.

⁴ L. R. 10 Ex. 261.

pass, was the proper form of action, because the injury was done by the servant without the master's express instructions. Therefore, when a person has been injured by negligence upon the part of a railway, or upon the part of the servants of that railway, the railway is not liable in trespass. It is also to be remembered that the action of trespass, being founded upon possession, cannot be brought for injury to personal property, unless that personal property was, at the time of the injury, in the possession of the plaintiff.¹ Nor can a father recover in trespass for an injury to a son, who, at the time of the injury, is not in his service.²

III. CASE AND ASSUMPSIT.

Passengers and servants of the railway may, by virtue of the contractual relation between the railway and themselves, sue either in case or assumpsit, but all other persons can sue only in case, for the relation between the railway and such persons is non-contractual.

341. He who, not being a passenger nor a servant of the railway, and consequently not standing in a contractual relation to the railway, is injured in the course of its operations, can ground his action only on the railway's breach of duty implied by law, for there is no privity of contract between him and the railway. An injured passenger may sue either in assumpsit upon the contract, or in case upon the breach of the duty raised by the law.³ The general principle is, as stated

¹ *Ward v. McCauley*, 4 T. R. 490; *Spencer v. Campbell*, 9 W. & S. 32.

² *Wilt v. Vickers*, 8 Watts 227.

³ *Ansell v. Waterhouse*, 6 M. & S. 393; *Pozzi v. Shipton*, 8 Ad. & El. 963, 35 E. C. L.; *Brotherton v. Wood*, 3 Brod. & B. 54, 7 E. C. L.; *Bank of Orange v. Brown*, 3 Wend. 158; *McCall v. Forsythe*, 4 W. & S. 179; *Zell v. Arnold*, 2 Pen. & W. 292; *Pittsburgh v. Grier*, 22 Penna. St. 54; *Marshall v. Y. N. & B. Ry.*, 11 C. B. 655, 73 E. C. L.; *Skinner v. L. B. & S. C. Ry.*, 5 Ex. 787; *G. N. Ry. v. Harrison*, 10 Ex. 376; *Austin v. G. W. Ry.*, L. R. 2 Q. B. 442; *Foulkes v. M. D. Ry.*, 4 C. P. D. 267, 5 Id. 157; *P. & R. R. R. v. Derby*, 14 How. 468; *Alton v. M. Ry.*, 19 C. B. N. S. 243, 115 E. C. L.; *P. R. R. v.*

by Lord Campbell in *Brown v. Boorman*,¹ that, "whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract." Holroyd, J., in *Ansell v. Waterhouse*,² puts the same view, saying, "although the law will raise a contract with a common carrier to be answerable for the careful conveyance of his passengers, nevertheless he may be charged in an action upon the case for a breach of his duty."

Yet the action, when brought to recover for injuries to a passenger, or to a servant of the railway, is so far founded upon the contractual relation between the railway and the person injured, that, whether the form of the action be case or assumpsit, a stranger to the contract cannot recover therein.

342. While, as Byles, J., said in *Alton v. The Midland Ry.*,³ "the plaintiff has his election to sue either upon the contract or for the tort," yet, "by changing the form of action, the right to sue cannot be extended to a 'stranger,'" for, as Blackburn, J., said, in *Hobbs v. L. & S. W. Ry.*,⁴ "the action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract." The action, therefore, when brought by an injured passenger, is so far founded upon the railway's duty as arising out of the contract between the railway and the passenger, that only a party privy to that contract can recover, whether the form of action be case or assumpsit. Thus, in *Alton v. Midland Ry.*,⁵ the plaintiff declared in case

Peoples, 31 Ohio St. 537; *B. C. P. Ry. v. Kemp*, 61 Md. 74, 18 Am. & Eng. R. R. Cas. 220; *Nevin v. P. P. C. Co.*, 106 Ill. 222, 11 Am. & Eng. R. R. Cas. 92.

¹ 11 Cl. & Fin. 44.

² 6 M. & S. 393.

³ 19 C. B. N. S. 243, 115 E. C. L.

⁴ L. R. 10 Q. B. 119.

⁵ 19 C. B. N. S. 213, 115 E. C. L.

for injury to his servant, a passenger on defendant's road, and consequent loss of services, averring that the defendant had contracted to carry the servant "for hire and reward to the defendant in this behalf;" the defendants demurred to the declaration, and also pleaded that they had contracted with the servant and not with the plaintiff. On demurrer the plea was held good, on the ground that a master can recover for loss of his servant's services only when caused by a pure wrong, but never when that wrong is, in substance, only a breach of contract. In *F. & A. St. P. Ry. Co. v. Stutler*,¹ a mother sued to recover for injuries to her minor son, a passenger on defendant's line, the injuries being caused by defendant's negligence. It was held, reversing the court below, and following *Alton v. Midland Ry.*, that the plaintiff could not recover, the ground of decision being that only a party to the contract can recover for a breach of duty founded on that contract.²

Where the ground of action is a pure tort, any one who has suffered a pecuniary loss directly resulting therefrom, may recover in case.

343. But where there is no contractual relation between the railway and the injured person, any one who, by reason of that injury, has suffered a pecuniary loss, may recover in case for a breach of the duty of the railway to carry safely any one whom they have received upon their line or premises; thus, in *Marshall v. Y., N. & B. Ry.*,³ where the plaintiff, the valet of a nobleman, sued to recover damages for his luggage lost

¹ 54 Penna. St. 375.

² Yet it has been held in Massachusetts that a master can recover in case for injuries to his servant while a passenger on defendant's line: *Ames v. U. Ry.*, 117 Mass. 541.

³ 11 C. B. 655, 73 E. C. L.

on defendant's line, the plaintiff having been a passenger, but his ticket having been bought and paid for by his master, it was held that the plaintiff could recover, Jervis, C. J., saying, the action lies for the luggage sued for as for personal injuries, "not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." So, in Berringer *v.* G. E. Ry.,¹ the claim alleged that the plaintiff's servant took a ticket and travelled by the L. I. & S. Ry., and that the train on which the servant was a passenger came into collision with the defendant's train at a junction through the negligence of the defendant's employés, and that the servant was injured; and it was held on demurrer that the action being against independent wrongdoers, not parties to the contract of carriage, and for a pure tort, the plaintiff could recover.

DISTINCTIONS IN PRACTICAL EFFECT BETWEEN THE ACTIONS OF CASE AND ASSUMPSIT.

When the plaintiff sues in assumpsit, he must at his peril join all of the parties with whom he contracted, he can recover for no tortious act that is not a breach of the contract declared upon, and his recovery therein is a bar to his subsequent action in another right upon the same contract; whereas when he sues in case, he may join, as defendants, any or all of those whose breach of duty injured him, he may recover all such damages as proximately result from the breach of duty, and his recovery in one right is no bar to his recovery in another right for the same injury.

344. When the plaintiff sues in case he may, at his election, join as defendants any or all of the parties whose breach of duty has caused his injury, but where

¹ 4 C. P. D. 163.

he sues in assumpsit he must, at his peril, sue all the parties to the contract.¹ Thus, in *Ansell v. Waterhouse*,² the plaintiff having averred in his *narr* that the defendant was the proprietor of a stage coach, who, as such, had received the plaintiff as a passenger under a duty to carry him safely, and that by the negligence of the defendant's servants, the plaintiff had been injured, and the defendant having pleaded in abatement that sixteen other named persons were co-partners, and should have been joined as defendants, upon general demurrer the plea was held bad, Bayley, J., saying: "There is a broad distinction in personal actions between tort and assumpsit, or such actions as arise *ex contractu* and *ex delicto*, which are founded upon contracts or upon wrongs independently of contract, and the proceedings vary accordingly. In *assumpsit* the plaintiff in his declaration and proof is confined to the very terms of the contract, and can recover in damages for no tortious act farther than it is a breach of the defendant's promise, express or implied. Whereas actions upon the case lie for the recovery of damages for consequential wrongs accruing from misfeasance or nonfeasance from the negligence or wilful conduct of the party, and in doing or omitting something contrary to the duty which the law casts upon him in the particular case."

345. Where the plaintiff sues in case he may recover for all damages naturally and necessarily arising, resulting from the defendant's breach of duty to him, and against any one or more of the parties whose breach of duty has caused his injuries.³ But when he sues in

¹ *McCall v. Forsyth*, 4 W. & S. 179; *Brotherton v. Wood*, 3 Brod. & B. 54, 7 E. C. L.; *Ansell v. Waterhouse*, 6 M. & S. 385, 18 E. C. L.

² 6 M. & S. 385, 18 E. C. L.

³ *Tompkins v. Clay St. H. R. Co.*, Cal. , 18 Am. & Eng. R. R. Cas. 144; *Stone v. Dickinson*, 5 Allen 29; *Churchill v. Holt*, 127 Mass. 165; *Bryant v. Bigelow Carpet Co.*, 131 Id. 491.

assumpsit he can recover in damages for no tortious act further than that it is a breach of the defendant's promise, express or implied; thus, in *Murdock v. B. & A. R. R.*,¹ the plaintiff was arrested by defendant's servant for an alleged improper use of a ticket, and he sued the defendant in contract for breach of contract of safe carriage, and it was held, following Hobbs' case that the plaintiff could recover only for the natural and proximate consequences of the breach, and that to recover for mental and physical suffering following the arrest he should have sued in *tort*. Where assumpsit is brought and judgment recovered on a breach of a railway's contract of carriage, that judgment is a bar to another action in another right on the same contract; thus, where a husband has sued and recovered in assumpsit for his wife's injuries caused by a railway's negligence in the performance of a contract of carriage of the wife, it was held that that judgment was a bar to a subsequent action of assumpsit brought by the husband to recover for loss of the wife's services and his expenditure for her medical treatment.²

IV. THE JOINDER OF COMMON LAW AND STATUTORY CLAIMS.

Common law and statutory claims for damages may, under certain conditions, be joined.

346. Common law and statutory claims for damages may be joined in the same action, where they of the same nature, admit of the same pleas, and are followed by the same judgment.³

¹ 133 Mass. 15, 6 Am. & Eng. R. R. Cas. 406.

² *Pollard v. N. J. R. & T. Co.*, 101 U. S. 223.

³ *Martin v. Stille*, 3 Whart. 337; *P. R. R. v. Bock*, 93 Penna. St. 427.

V. PAYMENT OF MONEY INTO COURT.

The payment of money into court admits, under certain limitations, the cause of action.

347. Payment of money into court by the railway where the form of action is case, and the declaration general and unspecific, admits a cause of action, but not the cause of action sued for; where the declaration is specific, so that nothing would be due from the railway to the plaintiff, unless it admitted the particular claim made by the plaintiff, the payment into court necessarily admits the cause of action so averred in the declaration. Payment of money into court upon a general count on assumpsit admits only a cause of action to the amount paid into court, and operates as an admission for no other purpose. Payment of money into court upon a declaration on a special contract admits the contract and the breach.¹

¹ Perren *v.* M. Ry. & C. Co., 11 C. B. 855, 73 E. C. L.; Schreger *v.* Carden, Id. 851.

CHAPTER II.

THE RIGHT OF ACTION FOR INJURIES CAUSING DEATH.

- I. The statutory right of action.
- II. The common law right.
- III. Terms of statutes conferring the right of action.

I. THE STATUTORY RIGHT OF ACTION.

At common law no action lies to recover damages for death, caused by a tort.

348. The rule of the common law is, as laid down by Lord Ellenborough in *Baker v. Bolton*,¹ that "in a civil court the death of a human being cannot be complained of as an injury," and the maxim *actio personalis moritur cum persona* succinctly expresses the legal theory that a right of action for a *tort*, being personal, dies with the person injured, and that any action brought therefor abates at common law with the death of the plaintiff.² The preamble to Lord Campbell's Act,³ to be hereinafter referred to, recites that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person. In *Osborn v. Gillett*,⁴ the plaintiff declared against the defendant for injuries to the plaintiff's daughter and servant, by reason whereof she afterwards died, claiming as special damages the loss of her services and her burial expenses; and the defendant having pleaded, *inter alia*, that the daughter "was killed upon the spot

¹ 1 Campb. 493.

² *Higgins v. Bucher*, Yelv. 89; *Eden v. L. & F. R. R.*, 14 B. Monr. 204; *Carey v. B. Ry.*, 1 Cush. 475; *Kramer v. S. F. M. St. R. R.*, 25 Cal. 434.

³ 9 & 10 Vict. c. 93.

⁴ L. R. 8 Ex. 88.

by the acts and matters mentioned in the declaration, so that the plaintiff did not and could not sustain any damage which entitles him to sue in this action," judgment on demurrer was entered for the defendant by Kelly, C. B., and Pigott, B. [Branwell, B., dissenting], upon the authority of *Baker v. Bolton*, and the legislative recognition of the principle of that case in the preamble to Lord Campbell's Act. So, in *Pulling v. G. E. Ry.*,¹ Pulling having, by the negligence of the defendant, been injured at a level crossing, and after bringing suit having died, and his widow and administratrix having been substituted as plaintiff in the action, and by her statement claiming damages for loss of decedent's wages, medical expenses, and injury to his personal estate, judgment upon demurrer was given for the defendant, upon the ground that the action being brought for a pure *tort* did not survive, but was abated by the death of the original plaintiff.² So, also, in *Cregin v. B. C. R. R.*,³ it was held that when a husband, having brought suit for injuries to the person of his wife, died, his right of action for the loss of his wife's society died with him, but his right of action for the loss of his wife's services and for his expenses for her medical treatment, being a pecuniary loss diminishing his estate, survived to his personal representatives. The rule has also been applied where a widow sued to recover for the death of her husband, an engine-driver in a railway's service;⁴ and where a husband sued for the death of his wife killed by the railway's negligence.⁵ The same principle has been asserted in

¹ 9 Q. B. D. 110.

² Cf. *Twycross v. Grant*, 4 C. P. D. 40.

³ 83 N.Y. 595.

⁴ *Hubgh v. N. O. & C. R. R.*, 6 La. An. 495, 498; *Herrmann v. Same*, 11 Id. 5.

⁵ *Green v. H. R. R. R.*, 2 Keyes (N.Y.) 294; *Lucas v. N. Y. C. R. R.*, 21 Barb. (N.Y.) 245.

actions brought by life assurance companies to recover from persons, natural or corporate, by whose wilful or negligent acts assured persons were killed and the assurance companies thereby compelled to make payment of the amounts assured on the lives of such persons. Thus, in *Mobile Life Insurance Co. v. Brame*,¹ Brame having wilfully killed McLemore, upon whose life policies of assurance had been issued by the corporation plaintiff, payment of which had been made after McLemore's death, the plaintiff sued Brame for the amounts of those policies, as damages caused to it by Brame's act. The cause was heard in the United States Circuit Court for the District of Louisiana upon the defendant's exception to the plaintiff's petition, and judgment having been rendered thereon for the defendant, was affirmed in error in the Supreme Court of the United States, upon the ground that the relation between the plaintiff and the assured was created by a contract to which the defendant was not a party, and that the damage to the plaintiff in being compelled to make good its contract with the assured was not a necessary or proximate result of the wrong done by the defendant in killing the assured. In *Connecticut Mutual Life Insurance Co. v. N. Y. & N. H. R. R.*,² the same rule was applied where the plaintiff sought to recover for the killing of its assured by negligence on the part of the railway.

II. THE COMMON LAW RIGHT.

But where the death is caused by a breach of contract, an action lies at common law to recover damages for the loss to the decedent's estate directly resulting from that breach of contract.

349. But, of course, a different rule applies where the injury, although from one point of view a tort, is from

¹ 95 U. S. 754.

² 25 Conn. 265.

another point of view a breach of contract, and it has been held that in such cases the right of action survives to the personal representatives. This rule has been extended to permit recoveries by the executors of passengers injured by a railway's breach of its contract of carriage. In *Knight v. Quarles*,¹ an administrator having brought assumpsit, and averred in his narr that the defendant, for certain fees to be paid him, undertook, as an attorney, to examine a title for the plaintiff's intestate, and that he omitted to do so, and that the intestate in consequence took an insufficient title, whereby his personal estate was injured, judgment on demurrer was entered for the plaintiff, and Richardson, J., said : "if a man contracted for a safe conveyance by coach, and sustained an injury by a fall, by which his means of improving his personal property was destroyed, and that property in consequence was injured, though it was clear he in his lifetime might, at his election, sue the coach proprietor in contract, or in tort, it could not be doubted that his executor might sue in assumpsit for the consequences of the coach proprietor's breach of contract." Willes, J., in his judgment in *Alton v. Midland Ry.*,² said, referring to *Knights v. Quarles* : "suppose the personal estate of a servant sustained injury through the defendant's breach of duty, as if he had taken a quantity of luggage with him which had been lost, or damaged, it is clear his executor could have sued for that damage." In *Potter v. M. Ry.*,³ a wife having been injured, while a passenger, by the defendant's negligence, and her husband having died, sued as his administratrix to recover for her husband's loss in respect of the injuries to her, and it was held in the Exchequer Chamber that the right of action being founded on a

¹ 2 Brod. & B. 102, 6 E. C. L.

² 30 L. T. N. S. 765, 32 Id. 36.

³ 19 C. B. N. S. 245, 115 E. C. L.

breach of contract survived to the husband's personal representative. In *Bradshaw v. L. & Y. Ry.*,¹ where a passenger, having been injured in a railway accident, died in consequence of his injuries, but after an interval, it was held that his executrix could recover in an action on the contract for the damage suffered by the decedent's estate by reason of the breach of the defendant's contract to carry him with reasonable safety, the ground of the decision being that the damage was not caused by the decedent's death, but by his inability to attend to his business during his lifetime, that inability resulting from the accident. Bradshaw's case was followed as an authority, but with apparent reluctance, in *Leggott v. G. N. Ry.*,² where the plaintiff, having sued to recover under Lord Campbell's Act as the administratrix of her deceased husband, again brought suit to recover for injury done to his personal estate by reason of his inability to attend to business from the date of the accident to the date of his death, and it was held that the recovery in the first action was no bar to a recovery in the second, the causes of action being different, and that as the plaintiff sued in the two actions in different rights, the pleadings in the first action, and the verdict for the plaintiff therein, did not estop the defendant from denying, in the second action, the cause and the circumstances of the injury.³

The right of action in suits to recover damages for death caused by a tort is, therefore, statutory.

350. Therefore, for want of a common law remedy, statutes vesting in certain designated persons a right of action for injuries resulting from death by negligence have been passed in different jurisdictions, and in the

¹ L. R. 10. C. P. 189.

² 1 Q. B. D. 599.

³ See also *Cregin v. B. C. R. R.*, 83 N. Y. 595.

case of a death, caused in any jurisdiction by a railway's breach of duty, the terms of the statute in force in the particular jurisdiction must be looked to in order to determine the right to sue, the form of action, the parties plaintiff and defendant, the conditions of liability, and the measure of damages.

III. STATUTES CONFERRING A RIGHT OF ACTION FOR DEATH.

351. The first of these statutes was enacted in England in 1846,¹ and is known as Lord Campbell's Act. It recites in its preamble that, "whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such a case should be answerable in damages for the injuries so caused by him," and it enacts that whosoever the death of a person shall be caused by such act, neglect, or default, "as would, if death had not ensued, have entitled the party to maintain an action to recover damages in respect thereof," then the person who would have been liable if death had not ensued shall, notwithstanding the death of the person injured, be liable in damages at the suit of the personal representative for the benefit of the wife, husband, parent, and child of the deceased. The act further authorizes the jury to "give such damages as they may think proportioned to the injuries resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, the damages to be apportioned among the beneficiaries as the jury shall direct. The act also provides that not more than one action shall lie for and in respect of the same subject-matter complained of. A later act² pro-

¹ 9 & 10 Vict. c. 94.

² 27 & 28 Vict. c. 95.

vides that if there be no personal representative any one of the beneficiaries may bring the action. Lord Campbell's Act has been followed in the statutes now in force in Canada ; and in the states of the United States, statutes of like effect have been enacted, references to, and the material provisions of which are given in the following table :

State.	Record of act.	Parties plaintiff.	Statutory measure of damages.	Statutory limitation of action.	Remarks.
Alabama	Code of 1876, p. 535, § 261, <i>et seq.</i> , p. 684, § 289.	Personal representatives or parents, if decedent be a minor.	" Such sum as the jury deem just."	Two years.	Recovery not subject to payment of decedent's debts. Criminal prosecution to conviction or acquittal no bar to action. Rule of <i>respondeat superior</i> applicable. See Smith v. L. & N. R. R., 75 Ala. 449, 21 A.M. & Eng. R. Cas. 157.
Arkansas	Digest, 1884, p. 1009, § 3225.	Personal representatives, or if none heir at law.	A fair and just compensation with reference to the pecuniary injuries to the wife and next of kin.	Two years.	Recovery for the exclusive benefit of the widow and next of kin.
California.....	Code, p. 958, §§ 376 and 377, as amend.	Heirs or personal representatives, or, in case of a minor, parent or guardian.	Such as, under all the circumstances, may be just.	As in other actions for personal injuries.	See M. S. R. R. v. McKeever, 59 Cal. 294.
Colorado.....	Genl. Stats. 1883, p. 381, § 1030. Act 24 March, 1874.	(1.) Husband or wife.	Not less than \$3,000, nor more than \$5,000.	Two years.	Net recovery half to husband or widow, and half to lineal descendants. If no lineal descendants, the whole net recovery to husband or widow; if no husband or widow, to the heirs (sic), as in case of intestacy. Death of person injured not to abate action brought by him.
Connecticut.....	Laws 1877, p. 242, § 877.	(2) Heirs.	Not less than \$500, nor more than \$5,000.	Eighteen months.	No special statutory limitation.
Delaware.....	Genl. Stats., title 19, cap. vi, § 9, p. 422; cap. xvii, p. 488; cap. xviii, § 14. P. 495. Acts of 1848, 1853, 1855, 1867, 1869, 1871, 1873, 1874.	(3) Father or mother.	Personal representatives.	Widow, or, if none, the personal representatives.	Death of person injured not to abate action.
Florida	Revised Code 1874, p. 644, cap. 31. Act of 26 February, 1866.	Widow, or, if none, the personal representatives.	(1.) Widow or husband.	Such as party entitled to sue may have sustained by the chil.-death.	Two years;
	Laws 1883, p. 59. Act of 28 February, 1883.	(2) Minor children.	(2) Minor children.	(3.) Persons dependent on decedent.	
				(4.) Personal representatives.	

Georgia.....	Code 1882, p. 746, § 2971, Acts of 1880, 1885, 1878.	full value of the life of the deceased. (1) Widow. (2) Child.	A fair and just compensa- tion for pecuniary injury to wife and kin, not exceeding \$5,000. Not to exceed \$10,000.	Two years.
Illinois	Rev. Stat. 1883, E: 630, § 1. Act of 12 February, 1883.	Personal repre- sentatives.	Recovery for exclusive benefit of widow and next of kin, and to be distributed as in case of intestacy.	Two years.
Indiana.....	Rev. Stat. 1881, P. 49. Act 7 April, 1881.	Personal repre- sentatives.	Recovery for exclusive benefit of widow and next of kin, and to be distributed as in case of intestacy. See <i>Stewart v. T. H. & L. R.</i> , 103 Ind. 44, 21 Am. & Eng. R. Cas. 209.	Two years.
Iowa.....	Rev. Code 1884, p. 685, § 2525.	Personal repre- sentatives, and, in case of minor child's death, the father or mother.	All causes of action survive. Civil remedy not merged in public offence, recovery to be assets of decedent's estate, but not applicable to pay- ment of debts.	No special limitation.
Kansas	Compiled Laws 1885, p. 656. Genl. Stat. 1881, cap. 57, § 1, p. 550.	Personal repre- sentatives or wid- ow, or heir.	The same, in case of death not wilfully caused, as in case of personal injuries not causing death, but, in case of death wilfully caused, punitive dam- ages. The damages sustained.	No special limitation.
Kentucky.....				One year.
Louisiana	Rev. Code, p. 427. Laws 1881, p. 94.	(1) Minor chil- dren, or widow. (2) Parents. The State.	Not less than \$500, nor more than \$5,000.	One year.
Maine.....	Rev. Stat. 1883, § 68, p. 482.			One year.
Maryland	Rev. Code 1878, P. 724.	The State, to the use of wife, hus- band, parent, or child.	Such as the jury may think proper to the injury to the beneficial plaintiff.	Twelve calendar months.
Massachusetts....	Pub. Stat. 1882, p. 421, § 6; pp. 637, 638, c. 112, §§ 212, 213.	Personal repre- sentatives.	Not less than \$500, nor more than \$5,000, to be assessed with reference to the degree of cul- pability of the person liable, etc.	One year.
				The statute is an amendment of Art. 2315 of the Civil Code of Louisi- ana. To be recovered by indictment, to the use of (1) widow, (2) children, (3) heirs. See <i>State v. M. C. R.</i> , 77 Me. 244, 21 Am. & Eng. R. Cas. 216. The recovery to be distributed as the jury shall find and direct. The proceeding is civil not criminal. Recovery for use of widow and chil- dren in equal moieties; if no children, then to the widow solely; and if no widow, then to the next of kin. There is also an alternative remedy by indictment, and on conviction a fine of not less than \$500 nor more than \$5,000, to be paid to the personal representatives for the use of the parties above mentioned. See Com- monwealth <i>v. B. & L. R.</i> , 134 Mass. 211; <i>McKinney v. B. & M. R.</i> R., 139 Mass. 642, 21 Am. & Eng. R. Cas. 213.

STATUTES.

State.	Record of act.	Parties plaintiff.	Statutory measure of damages.	Statutory limitation of action.	Remarks.
Michigan.....	2 Howell's Annotated Stat. (1882) 2650, § 8313; 1, Id. §§ 3391-2.	Personal representatives.	Such as the jury may deem fair and just, with reference to the pecuniary injury to the beneficiaries. Not more than \$5,000.	No special limitation.	Recovery to be distributed as in case of intestacy.
Minnesota	Stat. 1878, p. 825, § 2.	Personal representatives.	Widow or husband, or parent or child.	Two years.	Recovery to be distributed as in case of intestacy.
Mississippi.....	Rev. Code 1880, § 1510, p. 427.	Personal representatives.	Such as shall be fair and just with reference to the injury to the person suing.	One year.	Recovery to be for use of person suing, except in case of suit by a widow who has children, and then the recovery shall be distributed as personal assets of the deceased husband and father. See Kunter v. M. P. R. R., 81 Mo. 169, 21 Am. & Eng. R. Cas. 212.
Missouri.....	1 Genl. Stat. 1879, §§ 221-3, pp. 349, 351. Laws 1885, pp. 153, 154.	(1) Husband or wife. (2) Children, naturally born or legally adopted. (3) Parents, including adopting parents.	Such, not exceeding \$5,000, as the jury may deem fair and just, with reference to the necessary injury to the party entitled to sue, and also having regard to the mitigating or aggravating circumstances.	No special limitation.	Recovery to be for exclusive benefit of widow and next of kin, and to be distributed as in case of intestacy.
Nebraska.....	Compiled Stat. 1885, p. 284.	Personal representatives.	Such as the jury shall deem fair and just compensation for the pecuniary injury to the beneficiaries, not exceeding \$5,000.	Two years.	Recovery to be for the benefit of (1) husband or wife, (2) children, (3) grandchildren, (4) brothers and sisters, (5) next of kin, and not to be liable for decedent's debts. See Corliss v. W. N. & R. R. Co., N. H. —, 21 Am. & Eng. R. R. Cas. 208. Recovery for benefit of (1) widow, (2) children, (3) next of kin. Decedent's right of action survives.
Nevada.....	Compiled Laws 1873, §§ 115, 116, pp. 39, 40.	Personal representatives.	Such, pecuniary and exemplary, as the jury shall deem fair and just.	No special limitation.	Recovery for benefit of widow and next of kin, and to be distributed as in case of intestacy.
New Hampshire.	Act of 23 July, 1885, Laws of 1885, c. 35, § 1.	Personal representatives.	No statutory measure.	Twelve calendar months.	Recovery for benefit of husband, wife, or next of kin, and to be distributed as assets of decedent's estate, after payment of debts, etc.
New Jersey.....	Revision of 1877, p. 244.	Personal representatives.	Such as the jury deem fair and just, with reference to pecuniary injury to beneficiary. Such sum as the jury, etc., deem fair compensation for the pecuniary injury to the beneficiaries.	No special limitation!	
New York.....	Throop's Code 1883, cap. xv, §§ 197, etc., pp. 197, etc.	Personal representatives.			

North Carolina...	Code 1883, vol. I, § 1498, p. 587.	Personal representatives.	Fair and just compensation for pecuniary injuries to beneficiaries.	One year.
Ohio	2 Rev. Stat. 1884, § 6131, p. 1288; 3 Id. 6135, p. 276.	Personal representatives.	Such, not exceeding \$10,000, as jury may think proportioned to the pecuniary loss to the beneficiaries.	Two years.
Oregon	Genl. Laws, § 367, p. 187.	Personal representatives.	Not to exceed \$5,000.	Two years.
Pennsylvania	Act 15 April, 1801, §§ 18 and 19, P. L. 674; Act of 26 April, 1855, § 1, P. L. 300; Act of 4 April, 1868, § 2, P. L. 58; Constitution (1873), article III, § 21.	Husband, widow, children, or parents.	Compensation for pecuniary loss.	No special limitation.
Rhode Island.....	Pub. Stat. (1882) § 15, etc., p. 533.	Husband, widow, next of kin, and any person having a direct pecuniary interest in the continuance of the life of the deceased.	No statutory measure.	Two years.
South Carolina ...	Genl. Stat. (1882), § 2188, p. 627.	Personal representatives.	Such as jury may think proportioned to the injury to the beneficiaries.	Two years.
Tennessee.....	Code (1884), § 3130, p. 576.	Personal representatives, or widow, or children.	Mental and physical suffering, loss of time, and necessary expenses of the deceased, and the damage to the beneficiaries.	No special limitation.
Texas	Pascal's Dig., art. xv, etc., p. 35.	Husband, wife, children, parents, or personal representatives.	Such sum as the jury may think proportioned to the injury.	No special limitation.
Vermont.....	Rev. Laws 1880, § 2133, p. 434.	Personal representatives.	Such as is just, with reference to the pecuniary loss to the wife and the next of kin.	Two years.

Recovery not to be applicable to payment of debts or legacies, but to be distributed as in case of intestacy.
Recovery to be for benefit of wife or husband, or if none such, then of parents and next of kin, and to be distributed as in case of intestacy unless the court shall otherwise direct.
Recovery to be administered as personal property of the deceased person.

Recovery to be distributed as in case of intestacy without liability to creditors. See Books *v.* Darville, 95 Penna. St. 155; Mann *v.* Wicand, 4 Weekly Notes of Cases (Penna.) 6; L. L. Co *v.* Rupp, 12 Id. 17; C. & P. R. R. *v.* Rowan, 66 Penna. St. 393.

Where husband, or widow and children survive, husband or widow shall take one-half, and children the other half of the recovery.

Recovery shall be for benefit of wife, husband, parent, and children.

Recovery to be for benefit of widow and next of kin, free from liability for the debts of the decedent.

Recovery to be divided among parties entitled, as the jury shall find and direct, and not to be liable for the debts of the deceased.
Recovery for the benefit of the wife and next of kin, to be distributed as in case of intestacy.

State.	Record of act.	Parties plaintiff.	Statutory measure of damages.	Statutory limitation of action.	Remarks.
Virginia	Code 1873, § 7, P. 996, as amended by Act of 12 March, 1878.	Personal representatives.	Such as the jury may think fair and just, not exceeding \$10,000.	Twelve calendar months.	Recovery to be distributed among wife, husband, parent, or children, as jury may direct, and, if they do not direct, as in case of intestacy, without liability to payment of debts, and if there be neither wife, husband, parent, or children, then to next of kin, subject to decedent's debts. Recovery to be distributed as in case of intestacy, without liability to payment of debts. Recovery to be for benefit of (1) wife, or husband, (2) lineal descendants, and (3) lineal ancestors.
West Virginia.....	Amended Code 1884, § 5, p. 634.	Personal representatives.	Such as jury may deem fair and just, not exceeding \$10,000.	Two years.	
Wisconsin.....	Rev. Stat. 1878, § 4255, p. 1020.	Personal representatives.	Compensation for pecuniary injury, not exceeding \$5,000.	No special limitation.	

Statutes vesting a right of action for death have no extra-territorial force, and are enforceable in other jurisdictions only by comity.

352. Such statutes have no extra-territorial force, and they vest a right to recover only in cases where the death has been caused within the state where the statute is in force.¹ The general rule is that where a person has died from injuries caused by negligence within a jurisdiction whose statutes vest in the personal representatives of the person so dying a right to recover damages for the death, personal representatives appointed in another jurisdiction may sue in that last jurisdiction for the enforcement of the statutes governing the place of death;² but this doctrine is denied in some jurisdictions.³ The right to recover damages for death, when established by state legislation, is enforceable in a case between proper parties in the Federal Courts, and the jurisdiction of those courts is not subject to limitation by a proviso in a state statute that the action for the recovery of such damages shall be brought only in a state court.⁴

353. The Missouri Statute⁵ prohibiting the prosecution by a personal representative of a civil action for injuries to the person of his intestate, an administrator, appointed in Missouri, will not be permitted to sue in that state in order to enforce a right of action under a Kansas statute for the death of his intestate in Kansas;⁶

¹ *Whitford v. P. R. R.*, 23 N. Y. 465; *N. & C. R. R. v. Eakin*, 6 Coldwell (Tenn.) 582.

² *Dennick v. C. R. R.*, 103 U. S. 11, 1 Am. & Eng. R. R. Cas. 309; *Leonard v. C. S. N. Co.*, 84 N. Y. 48; *S. C. R. R. v. Nix*, 68 Ga. 572; *Morris v. C. R. I. & P. Ry.*, 65 Iowa 727, 19 Am. & Eng. R. R. Cas. 180; *N. & C. R. R. v. Sprayberry*, 9 Heisk. (Tenn.) 852.

³ *Woodward v. M. S. & N. J. R. R.*, 10 Ohio St. 121; *Richardson v. N. Y. C. R. R.*, 98 Mass. 85; *McCarthy v. C. R. I. & P. R. R.*, 18 Kans. 45; *Taylor v. The Penna. Co.*, 78 Ky. 348.

⁴ *C. & N. W. Ry. v. Whitton*, 13 Wall. 270. ⁵ R. S. 1879, Sec. 97.

⁶ *Vawter v. M. P. R. R.*, 84 Mo. 679, 19 Am. & Eng. R. R. Cas. 176.

nor will an administrator appointed in Missouri be permitted to sue in Kansas to recover for the death of his intestate in Kansas.¹ Where the death is caused in one jurisdiction and the action is brought in another jurisdiction, whose statutes authorize the action, it must be shown, as those statutes have no extra-territorial force, that there is a statute in the jurisdiction in which the death was caused authorizing a recovery therefor, and there is no presumption of the existence of such a statute.² Under Lord Campbell's Act a settlement with and a release of the railway by the person injured extinguishes the statutory right of action vested in his widow.³ So, also, where the person injured has contracted with his employer that the benefit of the act should not be claimed, it was held that his widow's action was thereby barred.⁴

¹ *Limekiller v. H. & St. J. R. R.*, 33 Kans. 83, 19 Am. & Eng. R. R. Cas. 184.

² *Debivoise v. N. Y., L. E. & W. R. R.*, 98 N. Y. 377; *S. R. & D. R. R. v. Lacy*, 43 Ga. 461.

³ *Read v. G. E. Ry., L. R.* 2 Q. B. D. 555.

⁴ *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357.

CHAPTER III.

THE PARTIES TO THE ACTION.

- I. The plaintiffs.
- II. The defendants.

I. THE PLAINTIFFS.

Where the action is founded on a contract, any party or privy to that contract who has been injured by its breach, may sue as plaintiff; and where the action is founded on a tort, not causing the death of the person injured, any one who has suffered a pecuniary loss directly resulting from that tort may sue as plaintiff, and where the action is founded on a tort causing death, the party entitled by virtue of the statute conferring the right of action may sue as plaintiff.

354. At common law the person who has been physically injured by a tort, and has survived his injury, can sue as plaintiff, and if the injuries to that person have not been the immediate cause of his death, any other person who has suffered a pecuniary loss directly resulting from that injury may sue to recover damages for that loss; thus, an infant may sue by his next friend for his personal injuries, and his father may also sue for the loss of his child's services; a servant may sue for his personal injuries, and his master may also sue for his loss of his servant's services; and a wife may sue for her personal injuries, and her husband may also sue for his loss of his wife's society and services.¹ Where a municipality has been compelled to respond in damages to a person injured by reason of the neglect of a

¹ As a general rule where the action is brought to recover in the right of a wife for her personal injuries her husband must be joined as a necessary party plaintiff, but under the statutes of Illinois and Iowa, an action to recover for injuries to the person of a wife must be brought in her name, without joining her husband: C. B. & Q. R. R. v. Dickson, 67 Ill. 122; C. & N. W. Ry. v. Button, 63 Id. 409; Tuttle v. C., R. I. & P. Ry., 42 Iowa 518.

railway to keep in repair a highway which the railway used as a part of its line, the municipality can recover from the railway the amount of the damages so paid.¹ Of course, as hereinbefore stated, when the injury has been done by the breach of a contract, one who was not a party or privy to that contract cannot bring a suit founded upon the contract.

II. THE DEFENDANTS.

The person or persons whose wrongful act or default was the cause of injury to the plaintiff, and any other person or persons who are legally responsible for the wrongful act or omission, may be made defendants to the action, provided always that, where the action is grounded upon a contract, both plaintiff and defendant are parties or privies to the contract.

355. The individual who has, by his non-performance of duty, or breach of contract, caused the injury, or any other person or persons, natural or corporate, who may be legally responsible for the acts and defaults of the wrongdoer, may be made the defendant, provided, of course, that where the action is grounded upon a contract, the plaintiff is a party to the contract; thus, a passenger who has been injured by a failure of any of the means of transportation cannot recover for injuries caused thereby from the contractors who supplied to the railway the particular article whose failure was the cause of his injury, for there is no privity of contract between the passenger and that contractor.² On

¹ W. & A. R. R. v. Atlanta, Ga., 19 Am. & Eng. R. R. Cas. 233; Robbins v. Chicago, 4 Wall. 657; District of Columbia v. B. & P. R. R., 4 Am. & Eng. R. R. Cas. 179; Town of Hampden v. N. H. & N. R. R., 27 Conn. 158; Woburn v. B. & L. R. R., 109 Mass. 283.

² Tollitt v. Sherstone, 5 M. & W. 283; Winterbottom v. Wright, 10 Id. 109; Longmeid v. Halliday, 6 Ex. 761. Langridge v. Levy, 2 M. & W. 519, 4 Id. 337; and George v. Skivington, L. R. 5 Ex. 1, are distinguishable because there the defendants were held liable upon the ground of fraud and misrepresentation.

the same principle a person with whom a contract has been made for the carriage of himself or of any other person may sue for the damages done by the railway's breach of that contract, but one who is no party to the contract of carriage, however much he may have suffered by the breach thereof, has no right of action for that breach.¹

356. Where the State, in the exercise of its sovereignty, has taken possession of, and operates, a railway line, it is, by virtue of its sovereignty, exempt from liability to persons injured by the negligence of the servants who are employed to operate the line;² but the shares of the capital stock of the corporation being as a legal entity distinct from the corporation,³ the fact that the State is the owner of all the shares of the stock of a railway corporation will not exempt the corporation from liability to suit for injuries caused by negligence on its part.⁴

357. Joint tort-feasors are jointly and severally liable; thus, in *Colegrove v. N. Y. & N. H. R. R. & N. Y. & H. R. R.*,⁵ the plaintiff, while a passenger upon a train of the first named corporation defendant, was injured in a collision between that train and a train of the last named defendant, and it was held that the two corporations as joint tort-feasors were jointly liable to him.⁶

¹ *Alton v. Midland Ry.*, 9 C. B. N. S. 213, 115 E. C. L.; *F. & A. St. P. I. v. Stutler*, 54 Penna. St. 375.

² *McFarlane v. The Queen*, 7 Can. S. C. 216; *The Queen v. McLeod*, 8 Id. 1, 16 Am. & Eng. R. R. Cas. 301.

³ *Regina v. Arnoud & Powell*, 9 Q. B. 806, 58 E. C. L.; *Van Allen v. The Assessors*, 3 Wall. 573.

⁴ *Hutchinson v. W. & A. R. R.*, 6 Heisk. (Tenn.) 634.

⁵ 6 Duer 382, 20 N. Y. 492.

⁶ See also *Cuddy v. Horn*, 46 Mich. 596; *Cooper v. E. T. Co.*, 75 N. Y. 116; *Kain v. Smith*, 80 N. Y. 458, 2 Am. & Eng. R. R. Cas. 545; *W. St. L. & P. Ry. v. Shacklet*, 105 Ill. 364, 12 Am. & Eng. R. R. Cas. 166; *Wylde v. N. R. R.*, 53 N. Y. 156.

So where two or more persons or corporations jointly operate a railway, they are jointly and severally liable to persons injured in the course of the railway's operations, and they may be sued jointly or severally.¹ So the railway and its servant, who, by his act of commission, injures any one to whom the railway owes a duty, are jointly liable for that injury.

¹ *Kain v. Smith*, 80 N. Y. 458, 2 Am. & Eng. R. R. Cas. 545; *Bissell v. M. S. & N. I. Ry.*, 22 Id. 258.

CHAPTER IV.

EVIDENCE IN ACTIONS AGAINST RAILWAYS FOR INJURIES TO THE PERSON.

- I. Admissibility of proof of declarations and admissions by agents and servants of the railway.
- II. Admissibility for the plaintiff of declarations of the person injured.
- III. Admissibility for the railway of admissions and declarations of the person injured.
- IV. Admissibility of evidence as to changes in the construction or mode of operation of the railway made subsequently to the happening of the injury.
- V. Inspection of the injuries of the person injured.
- VI. Evidence as to the speed of trains.
- VII. Evidence as to signals.
- VIII. Admissibility of life tables in evidence.
- IX. Evidence as to poverty of person injured, etc.

358. The admissibility of evidence in actions against railways is, in general, determinable by the rules of evidence applicable to the particular form of action, whether it be trespass, case, or assumpsit. I shall, therefore, notice only certain rules of evidence, whose applicability and effects have been discussed in the more recent cases.

I. ADMISSIBILITY OF PROOF OF DECLARATIONS AND ADMISSIONS BY AGENTS AND SERVANTS OF THE RAILWAY.

Such declarations and admissions are only admissible as part of the res gestæ when made contemporaneously with the happening of the injury to the plaintiff.

359. Where the acts of an agent or servant will bind the railway, there the representations, declarations, and

admissions of such agent or servant respecting the subject-matter will also bind the railway, if made at the time of the injury to the plaintiff, and constituting part of the *res gestæ*.¹ But declarations of the agent or servant of the railway, if made subsequently to the time of the injury to the plaintiff, are not part of the *res gestæ* and are not admissible in evidence against the railway.² Yet declarations of a servant are admissible when proven to have been made in the course of duty, as, for instance, a report by an engine-driver to a switch-tender that he had run over a man, it being the engine-driver's duty to report to the switch-tender, that the latter might hold other trains until the obstruction was removed, but declarations of the engine-driver of the manner of killing and the identity of the person killed are not admissible.³ Declarations of an alleged servant of the railway are not admissible against the railway to

¹ Story on Agency, § 134; *H. R. R. v. Coyle*, 55 Penna. St. 396; *Mullan v. P. & S. M. S. Co.*, 78 Id. 25; *McLeod v. Ginther*, 80 Ky. 399, 15 Am. & Eng. R. R. Cas. 291, 8 Id. 162; *Casey v. N. Y. C. & H. R. R. R.*, 78 N. Y. 518; *Penna. Co. v. Rudel*, 100 Ill. 603, 6 Am. & Eng. R. R. Cas. 30.

² *V. Packet Co. v. Clough*, 20 Wall. 529; *M. & M. R. R. v. Finney*, 10 Wisc. 388; *P., C. & St. L. R. R. v. Wright*, 80 Ind. 182, 5 Am. & Eng. R. R. Cas. 628; *Moore v. C. St. L. & N. O. R. R.*, 59 Miss. 243, 9 Am. & Eng. R. R. Cas. 401; *M. C. R. R. v. Coleman*, 28 Mich. 440; *Treadway v. S. C. & St. P. Ry.*, 40 Iowa 526; *C. & N. W. Ry. v. Fillmore*, 57 Ill. 265; *Furst v. S. A. R. R.*, 72 N. Y. 542; *P., C. & St. L. R. R. v. Theobald*, 51 Ind. 246; *Dietrich v. B. & H. S. Ry.*, 58 Md. 347, 11 Am. & Eng. R. R. Cas. 115; *Verry v. B., C., R. & M. Ry.*, 47 Iowa 549; *Newsom v. G. R. R.*, 66 Ga. 57; *E. T. V. & G. R. R. v. Duggan*, 51 Id. 212; *Travis v. L. & N. R. R.*, 9 Lea (Tenn.) 231; *Tanner v. L. & N. R. R.*, 60 Ala. 621; *McComb v. N. C. R. R.*, 70 N. C. 178; *Adams v. H. & St. J. R. R.*, 74 Mo. 553, 7 Am. & Eng. R. R. Cas. 414; *Luby v. H. R. R. R.*, 17 N. Y. 131; *Hamilton v. N. Y. C. R. R.*, 51 Id. 100; *Whitaker v. E. A. R. R.*, 1d. 295; *Marsh v. S. C. R. R.*, 56 Ga. 274; *Patterson v. W., St. L. & P. Ry.*, 54 Mich. 91, 18 Am. & Eng. R. R. Cas. 130; *A. G. S. Ry. v. Hawk*, 72 Ala. 121, 18 Am. & Eng. R. R. Cas. 194; *McDermott v. H. & St. J. Ry.*, 73 Mo. 516, 2 Am. & Eng. R. R. Cas. 85.

³ *B. & O. R. R. v. State, to use of Allison*, 62 Md. 479, 19 Am. & Eng. R. R. Cas. 83.

prove that the person making the declaration was a servant of the railway.¹

II. ADMISSIBILITY FOR THE PLAINTIFF OF PROOF OF DECLARATIONS OF THE PERSON INJURED.

Such declarations are admissible or the plaintiff if part of the res gestæ and made contemporaneously with the happening of the injury, but they are not in any case admissible as "dying declarations," and exclamations of the person injured, indicating pain and suffering, though made subsequently to the injury, are admissible in evidence for the plaintiff.

360. It has been held that declarations of persons injured, as to the cause of the injury, are admissible in evidence for the plaintiff as part of the *res gestæ*, if the declarations were made at the time of the accident.² It has also been held that declarations and expressions of the injured person, indicating pain and suffering, are admissible in evidence for the plaintiff as part of the *res gestæ*, although made at a time subsequent to the happening of the injury;³ and where the plaintiff sued for an injury done to his leg, a piece of bone was admitted in evidence with proof of the plaintiff's declaration made subsequently to the injury, that it had just come out of his leg.⁴ But such declarations and exclamations, if made at a medical examination which was undertaken for the purpose of obtaining testimony to be used on behalf of the plaintiff at the trial, are not admissible.⁵ Declarations of the person injured, as to

¹ Lindsay *v.* C. R. R., 46 Ga. 447.

² Entwistle *v.* Fergner, 60 Mo. 214; Bass *v.* C. & N. W. Ry., 42 Wise. 654; Brownell *v.* P. R. R., 47 Mo. 240; Friedman *v.* R. R., 7 Phila. 203.

³ H. & T. C. R. R. *v.* Shafer, 54 Tex. 641, 6 Am. & Eng. R. R. Cas. 421; Aveson *v.* Lord Kinnard, 6 East 188; Matteson *v.* N. Y. C. R. R., 35 N. Y. 487; Perkins *v.* C. R. R., 44 N. H. 223; Hagenlocker *v.* C. I. & B. R. R., 99 N. Y. 136.

⁴ Pringle *v.* C. R. I. & P. Ry., 64 Iowa 613, 18 Am. & Eng. R. R. Cas. 91.

⁵ G. R. & I. R. R. *v.* Huntley, 38 Mich. 537.

the cause of his injury, when made after the happening of the injury, and constituting merely a narrative of a past transaction, are not part of the *res gestæ*, and are not admissible in evidence for the plaintiff.¹ Despite the authorities which have been cited, it may well be doubted whether the declarations of the person injured, if made subsequently to the injury, are, in any case, properly admissible for the plaintiff, for they are not admissions against interest, nor are they part of the *res gestæ*, in the sense that they are contemporaneous explanations of any act done on the part of the plaintiff.

361 Dying declarations are admissible only in criminal prosecutions,² and, of course, are not admissible in civil actions against railways for injuries causing death.³

III. THE ADMISSIBILITY IN EVIDENCE FOR THE RAILWAY OF THE PROOF OF ADMISSIONS AND DECLARATIONS BY THE PERSON INJURED.

Such declarations, at whatever time made, are admissible in evidence for the railway.

362. Declarations and admissions of the person injured, at whatsoever time made, are admissible in evidence for the railway, as admissions against interest, and where the plaintiff is not the person injured, they are binding upon the plaintiff by reason of his privity with the person injured.⁴ But the declarations of one

¹ *Waldele v. N. Y. C. & H. R. R.*, 95 N. Y. 275, 19 Am. & Eng. R. R. Cas. 400; *C., C. & C. R. R. v. Mara*, 26 Ohio St. 185; *I. C. R. R. v. Sutton*, 42 Ill. 438; *Taylor v. G. T. R. R.*, 48 N. H. 304.

² Stephen's Digest of the Law of Evidence 32.

³ *Marshall v. C. & G. E. R. R.*, 48 Ill. 475; *Daily v. N. Y. & N. H. R. R.*, 32 Conn. 356; *Waldele v. N. Y. C. & H. R. R.*, 26 Hun. (N. Y.) 69.

⁴ *Stein v. G. A. Ry.*, 10 Phila. 440; *Cooper v. C. R. R.*, 44 Iowa 134; *sed. cf. O. & M. R. R. v. Hammersley*, 28 Ind. 371.

who is neither the person injured, nor the plaintiff, nor the plaintiff's agent, are not admissible in evidence for the railway ; thus, where a wife sues in her own right for her personal injuries, the subsequent declarations of her husband as to the cause of the injury are not admissible in evidence against her ;¹ nor are the declarations of a wife as to the cause of the injury admissible in evidence as against her husband, the plaintiff.²

The non-performance of a duty by a railway servant may be proved by direct evidence of the fact, or indirectly by evidence that the railway servant was, at the time of the injury, incapacitated by intoxication or otherwise, but it cannot be proved by showing that the servants of the railway are habitually overworked.

363. Evidence is admissible to prove that a railway servant who was charged with the performance of a particular duty at a particular time, and whose non-performance of that duty was the cause of the injury for which the plaintiff sues, did not perform that duty by reason of his absence from his post, or because he was then incapacitated by drunkenness, or otherwise ; but evidence is not admissible to prove that servants of the railway, who are charged with the performance of such duties, are so habitually overworked that they are not competent for the performance of their duties, for such evidence is, at best, only a presumption founded upon a presumption.³

¹ *Keller v. S. C. & St. P. R. R.*, 27 Minn. 178.

² *Stillwell v. N. Y. C. R. R.*, 34 N. Y. 29.

³ *P. C. P. Ry. v. Henrice*, 92 Penna. St. 431, 4 Am. & Eng. R. R. Cas. 544.

IV. ADMISSIBILITY OF PROOF OF COLLATERAL OCCURRENCES.

"The occurrence of facts similar to, but not connected with, the fact in issue by the relation of cause and effect, is not admissible in evidence."

364. The general rule is that quoted in the head note, from Mr. Justice Stephen;¹ thus, the charge of negligence against the railway being based on the maintenance of an imperfect switch and the failure to repair a broken rail, evidence of other defects at other points on the line is not admissible.² So, in an action for injuries to a passenger evidence is not admissible of another accident at the same place under similar circumstances.³ There are, however, some cases which maintain a different doctrine; thus, the question at issue being whether signals were given at a particular crossing by a particular train, it has been held that evidence is admissible to show that such signals were not given by that train at another crossing.⁴ It has also been held that evidence is admissible to show that engines of the defendant habitually pass a certain crossing at great speed, as tending to prove that on a particular occasion another engine did pass the crossing at great speed.⁵ The negligence charged upon the railway being a failure to maintain its line in a safe condition for the transportation of passengers, evidence has been held to be admissible of recent and frequent derailments of its trains.⁶ In such a case, evidence has also been held to

¹ Digest of Evidence, cap. 111, p. 15.

² Morse *v.* M. & St. L. Ry., 30 Minn. 465, 11 Am. & Eng. R. R. Cas. 168; P., C. & St. L. Ry. *v.* Williams, 74 Ind. 462, 3 Am. & Eng. R. R. Cas. 457; Reed *v.* N. Y. C. R. R., 45 N. Y. 574.

³ Davis *v.* O. & C. R. R., 8 Oregon 172; C., B. & Q. R. R. *v.* Lee, 60 Ill. 501.

⁴ Bower *v.* C., M. & St. P. R. R., 61 Wisc. 457, 19 Am. & Eng. R. R. Cas. 301.

⁵ Shaber *v.* St. P., M. & M. R. R., 28 Minn. 103, 2 Am. & Eng. R. R. Cas. 185.

⁶ M. & M. R. R. *v.* Ashcroft, 48 Ala. 15, 49 Id. 305.

be admissible as to the unsafe condition of the line at points other than that where the injury happened.¹ The doctrine of those cases is more than questionable. The existence of negligence upon the part of the railway at a different place, or at the same place upon another occasion, is not necessarily inconsistent with the exercise of due care on the part of the railway at the time and place of the injury, and the introduction of proof of such collateral occurrences necessarily raises for determination by the jury distinct issues, whose consideration has an obvious tendency to divert their minds from the issues raised by the pleadings in the cause. Of course, this rule does not exclude the evidence of occurrences, which are not collateral to the plaintiff's injury; thus, where the plaintiff sues for injuries resulting from the fright of a horse caused by some particular noise, evidence that other horses were frightened at that time by the same noise is admissible, for it tends to prove the dangerous character of the noise.² So, where the case turns on the sufficiency or insufficiency of a particular appliance, such as a switch, evidence is admissible of other accidents caused by switches similarly constructed, because it tends to prove the insufficiency of the particular form of switch.³

Proof as to changes in the construction or mode of operation of the railway, made subsequently to the happening of the injury to the plaintiff, is not admissible.

365. Evidence is not admissible to prove that after an accident, a railway made changes in the construction of its line, or adopted a different mode of operation, as,

¹ *Allison v. C. & N. W. Ry.*, 42 Iowa 274; *Holyoke v. G. T. R. R.*, 48 N. H. 541; *Reed v. N. Y. C. R. R.*, 56 Barb. 493.

² *Gordon v. B. & M. R. R.*, 58 N. H. 396.

³ *Morse v. M. & St. L. Ry.*, 30 Minn. 465, 11 Am. & Eng. R. R. Cas. 168.

substituting new for old planks at a level crossing,¹ or substituting a new bridge for the old bridge, the proximity of whose sides to the line was the cause of injury to the plaintiff,² or changing the character of a switch,³ or reconstructing an embankment after a storm of unprecedented violence;⁴ or putting in new ties after an accident.⁵ On the other hand, it has been held that evidence is admissible to show that after an accident at a crossing certain precautions were taken to prevent similar accidents;⁶ or that where the injury to the plaintiff had resulted from the removal of a plank at a crossing, the railway had, after the happening of the injury, replaced the plank in position;⁷ or that where the injury was caused by the proximity of a station platform to a main line track, the railway, after the injury to the plaintiff, relocated its platform;⁸ or that where the cause of injury to the plaintiff was the proximity of a main line track to a coal scales, the railway after the injury to the plaintiff had changed their relative location.⁹ On principle, it is not easy to see why such evidence should be regarded as admissible. A change in a mode of operating the line, or a substitution of a different appliance at a particular point, is not necessarily an admission that the discarded mode of operation or appliance was dangerously defective, for, in railway practice, such changes are frequently made from motives

¹ Payne *v.* T. & B. R. R., 9 Hun (N. Y.) 526.

² Dale *v.* D. L. & W. R. R., 73 N. Y. 468.

³ Salter *v.* D. & H. C. Co., 3 Hun (N. Y.) 338; Morse *v.* M. & St. L. Ry., 30 Minn. 465, 11 Am. & Eng. R. R. Cas. 168.

⁴ Ely *v.* St. L., K. C. & N. Ry., 77 Mo. 34, 16 Am. & Eng. R. R. Cas. 342.

⁵ Reed *v.* N. Y. C. R. R., 45 N. Y. 574.

⁶ Shaber *v.* St. P., M. & M. Ry., 28 Minn. 103, 2 Am. & Eng. R. R. Cas. 185; O'Leary *v.* Mankato, 21 Minn. 65; Phelps *v.* Mankato, 23 Minn. 276.

⁷ Kelly *v.* S. M. R. R., 28 Minn. 98, 6 Am. & Eng. R. R. Cas. 264.

⁸ P. R. R. *v.* Henderson, 51 Penna. St. 315.

⁹ W. C & P. R. R. *v.* McElwee, 67 Penna. St. 311; see also McKee *v.* Bidwell, 74 Id. 218.

of economy, or from the desire of obtaining greater efficiency without increased cost. The introduction of such evidence is also open to the objection, that it raises distinct and independent issues for the consideration of the jury.

Proof is admissible of an attempt to suborn false testimony, as constituting an admission that the case of the party so attempting is not well founded.

366. Evidence is admissible to prove that the plaintiff, or the defendant, or the agent of either of them, endeavoured to suborn false testimony to be adduced in the cause;¹ and, in *Moriarity v. L. C. & D. Ry.*, Cockburn, C. J., states, as the reason of this rule, that “the conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood tends fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive. I fully agree that it should be put to the jury, with the intimation that it does not always follow because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gain-

¹ *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139; *Moriarity v. L. C. & D. Ry.*, L. R. 5 Q. B. 314; *C. C. Ry. v. McMahon*, 103 Ill. 485, 8 Am. & Eng. R. R. Cas. 68; *March v. S. C. R. R.*, 56 Ga. 274.

ing of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than a prisoner's making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the tribunal which has to judge of the facts."

V. INSPECTION OF THE INJURIES OF THE PERSON INJURED.

The person injured is entitled to exhibit his personal injuries to the jury, and the court, in its discretion, may direct the person injured to submit to a physical examination by medical men appointed by the court.

367. The person injured may exhibit his injuries to the jury.¹ Where, in its opinion, the interests of justice justify it, the Court may require the injured person to submit to an examination by competent and disinterested experts on behalf of the railway.² So also the Court may, in its discretion, direct the person injured to perform, in the presence of the jury, a physical act which will necessarily test the nature and character of his physical injuries.³

VI. SPEED OF TRAINS.

Any witness who saw the train in motion at the place of the injury may testify as to its speed, but unless he fixes its speed by some reliable data, his testimony will be of little weight.

368. Any person who saw a train in motion at any time, and at any place, is a competent witness to testify

¹ *Mulhade v. B. C. R. R.*, 30 N. Y. 370.

² *Walsh v. Sayre*, 52 IHow. Pr. 334; *Schroeder v. C., R. I. & P. Ry.*, 47 Iowa 375; *A., T. & S. F. Ry. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. R. Cas. 378; *S. C. & P. Ry. v. Finlayson*, 16 Neb. 578, 18 Am. & Eng. R. R. Cas. 68; *White v. M. C. R. R.*, 61 Wisc. 536, 18 Am. & Eng. R. R. Cas. 213; *Loyd v. H. & St. J. R. R.*, 53 Mo. 509.

³ *Hatfield v. St. P. & D. Ry.*, 33 Minn. 130, 18 Am. & Eng. R. R. Cas. 292.

as to the speed of that train at that time and place;¹ but unless the witness is experienced in observing the movements of trains, and unless he observes the time occupied by the movement of the train over a definite space, his testimony will not furnish a reliable basis for a determination of the actual rate of speed of the train. As Lyon, J., said in *Hoppe v. C. M. & St. P. Ry.*:² "the estimate of a witness, especially of a non-expert, of the rate of speed of a moving railway train is very unsatisfactory proof, and should be received with great caution. If the *res gestæ* render it impossible, or even highly improbable, that the estimate can be, or is, correct, it should be rejected." In *Tully v. F. R. R.*,³ Colburn, J., said: "the only evidence as to the rate of speed of the train was the testimony of one witness, who saw the train stop, that it stopped forty or fifty yards from the crossing; and of another that he noticed that the train, after it had stopped, was about three hundred yards from the place of the accident. We are of the opinion that no inference could be drawn from this evidence, that the train passed the crossing at an unreasonable rate of speed. How soon the train would have stopped depended upon the state of the track and the weight of the train, upon the kind of brakes used, whether to be applied by the engineer or by men along the train, and, if the latter, how quickly the men responded to the signal, and upon how promptly after the accident the engineer applied the brakes, or gave the signal, and how soon he discovered the accident, and upon these points there was no evidence whatever. Neither was there any evidence of how soon a given train, at a given rate of

¹ *D. & M. R. R. v. Van Steinburg*, 17 Mich. 99; *C. B. & Q. R. R. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. R. Cas. 225.

² 61 Wisc. 357, 19 Am. & Eng. R. R. Cas. 74.

³ 134 Mass. 499, 21 Am. & Eng. R. R. Cas. 682.

speed, could be stopped, under any given circumstances, and this cannot be considered a matter of common knowledge." On the other hand, in Penna. Coal Co. *v.* Conlan,¹ witnesses were permitted to testify as to the speed of a train without reference to any standard of speed, and testimony was also admitted to show the distance run by the train after striking a person, without showing any of the circumstances regarded as material in the Tully case. In Van Horn *v.* B. C. R. & N. Ry.,² non-expert witnesses were allowed to testify "that they judged from the sound of the train that at the time of the accident it was running very rapidly, and more than six miles an hour, which it appears was the highest speed allowed by ordinance of the city;" and such testimony was held sufficient to justify a finding of negligence against the railway. One case³ goes so far as to hold that only experts can testify as to the time and distance within which a moving train can be brought to a stop. In G. R. & I. R. R. *v.* Huntley,⁴ it is held that evidence as to the speed of a train should show the actual rate by reference to some standard of rapidity, and should show that that rate was dangerous under the circumstances, and that the mere opinion of a passenger is not satisfactory proof of the speed of a train.

VII. SIGNALS.

The credibility and effect of testimony, that signals were or were not given, is for the jury; but they should be directed by the judge as to the relative weight of the testimony.

369. The testimony of witnesses that signals were given is of higher grade than testimony that they were

¹ 101 Ill. 93, 6 Am. & Eng. R. R. Cas. 243.

² 59 Iowa 33, 7 Am. & Eng. R. R. Cas. 591.

³ M., A. & B. Ry. *v.* Stewart, 30 Kans. 226, 13 Am. & Eng. R. R. Cas. 503.

⁴ 38 Mich. 539.

not given, and the testimony of witnesses who were listening for the signals is of higher grade than the testimony of witnesses who were not listening for them, but the credibility and effect of all such testimony is for the jury;¹ thus, in *Greany v. L. I. R. R.*,² where the railway was held liable to a traveller on the highway, who was injured, at a grade crossing in a village close to the railway station, by a train which was running at high speed, passengers on the train having testified that the crossing signals were not given, Danforth, J., said, as to the evidence that the signals were omitted: "it is apparent that the best evidence of the fact in dispute would be the testimony of those persons who, on the particular occasion in question, had the custody or management of the bell or whistle. They were, however, in the employ of the defendant, themselves interested in proving that the proper signals were given by those instruments, and the law does not require an adverse party to put his case in the hands of persons having such relations to the transaction. Besides those persons, all others must give evidence secondary in character. One person might be watching the bell, looking at it, or listening for its sound; the value of his testimony would depend upon his nearness to the machine, the accuracy of his sense of sight or hearing, the existence, or force, or direction of the wind, and other causes. Another person might be neither looking nor listening, and yet his position be such, and the cir-

¹ *D. W. & W. Ry. v. Slattery*, 3 App. Cas. 1155; *Longenecker v. P. R. R.*, 105 Penna. St. 323; *C. B. & Q. R. R. v. Stumps*, 55 Ill. 367; *C. & A. R. R. v. Gretzner*, 46 Id. 74; *C. B. & Q. R. R. v. Dickson*, 88 Id. 431; *C. & A. R. R. v. Robinson*, 106 Id. 142, 19 Am. & Eng. R. R. Cas. 396; *C. B. & Q. R. R. v. Dougherty*, 110 Id. 521; *Culhane v. N. Y. C. & H. R. R. R.*, 60 N. Y. 133; *Klanowski v. G. T. Ry.*, Mich. , 21 Am. & Eng. R. R. Cas. 648; *Rhoadees v. C. & G. T. Ry.*, Mich. , 21 Am. & Eng. R. R. Cas. 659; *Bunting v. C. P. R. R.*, 14 Nev. 351, 6 Am. & Eng. R. R. Cas. 282.

² 101 N. Y. 419.

cumstances about him so favourable, that his testimony would be of equal or greater persuasive power than that of the other. A jury must ascertain. An appellate court cannot say that the testimony of either should be rejected. Nor should a trial judge be required to determine its weight, or the fact which it did or did not ascertain, if it has any legal effect. No error, therefore, was committed in allowing the witnesses, K., T., and R., to testify. They were passengers upon the train causing the injury, and were in such position that it would not have been impossible for them to have heard the signal if it had been given." But in *Ellis v. G. W. Ry.*,¹ it was held in the Court of Exchequer Chamber (Cockburn, C. J., dissenting), that testimony for the plaintiff that the plaintiff did not see the lights of an approaching train, nor hear its signals, is equally consistent with two different states of facts, viz.: that the train was not lit and the signals were not given, or that the train having been lit and the signals having been given, the witness failed to observe either the lights or the signals; and that for that reason the testimony proves nothing, and makes no case to go to the jury. The same view is expressed in *Bohan v. M., C. S. & W. Ry.*,² in which case Lyon, J., said, with great force: "the testimony of the plaintiff's witnesses, that they did not hear the bell ring, or did not see the lighted lantern at the head of the gravel ears, is purely negative, and its negative character is intensified by the fact, which is made perfectly obvious by their testimony, that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record the credibility of the de-

¹ L. R. 9 C. P. 551.

² 61 Wisc. 391, 19 Am. & Eng. R. R. Cas. 276.

fendant's witnesses, who testified positively to the ringing of the bell and the presence of the brakeman on the gravel car with a lighted lantern, stands unimpeached. * * * The negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given." In *Tully v. F. R. R.*,¹ Colburn, J., said: "the only evidence upon the subject of the ringing of the bell or sounding of the whistle came from one witness, and was as follows: 'I thought I heard the sound of the train coming, and it sounded to me like the puffing of the engine, and about the bell ringing I cannot say whether I heard it or not. I disremember, I was so excited at the time.' And in answer to the question, 'Did you hear any whistle?' he said, 'I don't remember.' This was all the evidence, and we are of opinion that it would not warrant the jury in finding that the bell was not rung, or that the steam whistle was not sounded. If it is urged that, if the bell had been rung or the whistle sounded, the witness would have remembered it, it may be urged, with about the same force, that, if the bell had not been rung nor the whistle sounded, the witness would, under the circumstances, have noticed the omission and remembered it. No legitimate inference can be drawn from the testimony one way or the other, and the attempt to draw an inference could only end in a mere conjecture."

370. The testimony of the plaintiff and his witnesses in such cases is, however honest and truthful, not reliable. The excitement and shock of the accident no-

¹ 134 Mass. 499, 14 Am. & Eng. R. R. Cas. 682.

cessarily affect the accuracy of the plaintiff's recollection as to the circumstances immediately preceding the accident. The plaintiff and those who are in his immediate company at the time of the injury always believe that signals of the train's approach were not given, because they did not hear those signals, for if they had heard them they would not have attempted to cross the line, and they assume that, which the experience of life contradicts, that if the signals had been given they must have heard them. The testimony of disinterested bystanders is equally unreliable, whether they testify that the signals were or were not given, unless it be shown that for some particular reason their attention was directed to the approach of the train and to the sounding or non-sounding of its signals, and this remark applies with the greater force to people who live near a railway line, or whose calling compels them to pass their time in proximity thereto, for such people become so accustomed to the noises incident to railway operations that any one sounding of the whistle or ringing of the bell makes no impression upon them. At the best, the testimony for the plaintiff being negative is not of equal value with positive testimony that the signals were given. The testimony of the engine-driver and fireman that the signals were given is of greater value. The railway servants who hold those responsible positions are generally men of intelligence. They realize thoroughly the dangers necessarily incident to railway operations. They know that their duty requires them to give such signals, and that their own lives and the lives of the train hands and passengers as well as the lives of those who may cross the line may be put in peril if a collision result from their non-performance of duty in that respect, and that the disregard of that duty is an unpardonable offence against discipline, and

as such, a cause of dismissal from the service. There are, therefore, operating against the engine-driver's and fireman's neglect to give the necessary signals some of the strongest forces that can control human action, namely, the habits formed by discipline, professional ambition, a sense of duty, and the love of life. The reasonable doctrine is, as stated in section 369, that it is for the jury to weigh the evidence, *pro* and *con*, as to the giving of signals in such cases, but it is certainly the duty of the judge to put before the jury those considerations which determine the value of the conflicting evidence on one side and the other, in order that a just result may be reached. It is, however, held in Illinois, that it being the province of the jury to determine for themselves the credibility and weight of conflicting evidence, it is not the duty of the court to direct the jury what evidence is entitled to greater consideration on their part.¹

VIII. ADMISSIBILITY OF LIFE TABLES.

Approved life tables are admissible in evidence to show, in case of death, the decedent's expectancy of life.

371. The Carlisle or other approved tables are admissible in evidence to show the injured person's expectancy of life.² In *Rowley v. L. & N. W. Ry.*, the Carlisle tables were referred to by a witness who stated

¹ *Rockwood v. Poundstone*, 38 Ill. 200; *L. N. A. & C. Ry. v. Shires*, 108 Id. 617, 19 Am. & Eng. R. R. Cas. 387; *C. & A. R. R. v. Robinson*, 106 Ill. 142, 19 Am. & Eng. R. R. Cas. 396.

² *Rowley v. L. & N. W. Ry.*, L. R. 8 Ex. 221; *McDonald v. C. & N. W. Ry.*, 26 Iowa 124; *Scheffler v. M. & St. L. Ry.*, 32 Minn. 125, 518, 19 Am. & Eng. R. R. Cas. 173; *Simonson v. C., R. I. & P. Ry.*, 48 Iowa 19; *K. P. Ry. v. Lundin*, 3 Colo. 94; *D. S. P. & P. Ry. v. Woodward*, 4 Id. 1; *Sauter v. N. Y. C. & H. R. R. R.*, 66 N. Y. 50; *C. R. R. v. Richards*, 62 Ga. 306; *Donaldson v. M. & M. R. R.*, 18 Iowa 280; *L. C. & L. R. R. v. Mahony*, 7 Bush (Ky.) 235; *B., C., K. & N. R. R. v. Coates*, 62 Iowa 487, 15 Am. & Eng. R. R. Cas. 265.

that he was an "accountant," and had had personal experience as to the mode in which life insurance business was conducted, and he then gave evidence as to the expectancy of life which was material in that case. It was held in the Exchequer Chamber that the evidence was properly admitted, Blackburn, J., saying: "We think the average and probable duration of a life of that age was material, and we do not see how that could be better shown than by proving the practice of life insurance companies, who learn it by experience. It was objected that the witness was not an actuary, but only an accountant, but as he gave evidence that he was experienced in the business of life insurance, we think his evidence was admissible, though subject to remark on its weight." Brett, J., however, doubted the competency of the witness upon the ground that he was not an actuary. In *Donaldson v. M. & M. R. Ry.*,¹ and in *Scheffler v. M. & St. L. Ry.*,² it is held that the tables are not to be proved by witnesses, but are to be judicially taken notice of by the court.

IX. PROOF AS TO POVERTY OF THE PERSON INJURED.

Proof is not admissible of the poverty of the person injured, or killed, or of the number of individuals dependent on him for support.

372. Proof of the number of the family dependent upon the person injured, or of his or their poverty, is not admissible, for such testimony would obviously tend to prejudice the jury and to divert their minds from the real issues in the cause.³

¹ 18 Iowa 280.

² 32 Minn. 125, 518, 19 Am. & Eng. R. R. Cas. 173.

³ *Penna. Co. v. Roy*, 102 U. S. 451, 1 Am. & Eng. R. R. Cas. 225; *C. B. & Q. R. R. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. R. Cas. 225; *M. P. Ry. v. Lyde*, 57 Tex. 505, 11 Am. & Eng. R. R. Cas. 188.

CHAPTER V.

THE BURDEN OF PROOF.

- I. The burden of proving negligence.
- II. The burden of proving contributory negligence.

I. THE BURDEN OF PROVING NEGLIGENCE.

The burden is upon the plaintiff of showing affirmatively negligence upon the part of the railway.

373. The general rule as to the burden of proof can best be stated in the words of Mr. Justice Stephen,¹ as follows: “whoever desires any court to give judgment as to any legal right or liability which depends on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist. The burden of proof in any action lies when the action begins on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which might appear upon the pleadings. As the action proceeds, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favour.” Under this general rule the plaintiff in actions to recover for injuries resulting from negligence must show affirmatively the duty of the defendant under the circumstances and the defendant’s non-performance of

¹ Digest of the Law of Evidence, art. 93, 95.

that duty;¹ for, as Willes, J., said in *Daniel v. M. Ry.*:² "it is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." This dictum is cited with approval in *Hayes v. M. C. R. R.*,³ and in *P., W. & B. R. R. v. Stebbing*.⁴ When the evidence fails to establish the defendant's duty and its non-performance, that is, when the evidence is equally consistent with the existence or non-existence of negligence, the judge ought not to permit the cause to go to the jury.⁵ So where in an

¹ *C. & N. W. Ry. v. Smith*, 46 Mich. 504; *Brown v. C. & B. St. Ry.*, 49 Id. 153; *Henry v. L. S. & M. S. Ry.*, Id. 495; *Mitchell v. C. & G. T. Ry.*, 51 Id. 236; *C. St. L. & N. O. R. R. v. Trotter*, 61 Miss. 417; *Parrott v. Wells*, 15 Wall. 524; *P. & R. R. R. v. Heil*, 5 Weekly Notes of Cases (Penna.) 91; *Clark v. P. & R. R. R.*, Id. 119; *P. & R. R. R. v. Hummell*, 44 Penna. St. 375; *P. & R. R. R. v. Spearen*, 47 Id. 300; *Holbrook v. U. & S. R. R.*, 12 N. Y. 236; *Curtis v. R. & S. R. R.*, 18 Id. 524; *P., W. & B. R. R. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. R. Cas. 36; *C. C. & I. C. Ry. v. Troesch*, 68 Ill. 545; *Robinson v. F. & W. R. R.*, 7 Gray (Mass.) 92.

² *L. R. 3 C. P.* 216, 222.

³ 111 U. S. 228.

⁴ 62 Md. 504, 19 Am. & Eng. R. R. Cas. 36.

⁵ *Cotton v. Wood*; 8 C. B. N. S. 568, 98 E. C. L.; *Hammack v. White*, 11 C. B. N. S. 588, 103 E. C. L.; *Toomey v. I.*, B. & S. C. Ry., 3 C. B. N. S. 146, 91 E. C. L.; *Gallagher v. Piper*, 16 C. B. N. S. 692, 111 E. C. L.; *Welfare v. I.* & B. Ry., L. R. 4 Q. B. 693; *Manzoni v. Douglass*, 6 Q. B. D. 145; *Allyn v. B. & A. R. R.*, 105 Mass. 77; *Lane v. Crombie*, 12 Pick. 177; *Corcoran v. B. & A. Ry.*, 133 Mass. 507; B., C., R. & N. Ry. v. Dowell, 62 Iowa 629; *Carter v. C. & G. Ry.*, 19 S. C. 20; B. & O. R. R. v. The State, to use of Allison, 62 Md. 479, 19 Am. & Eng. R. R. Cas. 83; *Ford v. C. I. R. R.*, Iowa , 17 Am. & Eng. R. R. Cas. 599; C. & A. R. R. v. Mock, 88 Ill. 87; *Cordell v. N. Y. C. & H. R. R. R.*, 75 N. Y. 330; *Warner v. E. R. R.*, 44 Id. 465; T., W. & W. Ry. v. Branagan, 75 Ind. 490, 5 Am. & Eng. R. R. Cas. 630; *Willoughby v. C. & N. W. Ry.*, 37 Iowa 432; cf. *Allen v. Willard*, 57 Penna. St. 347; *Simpson v. L. G. Omnibus Co.*, L. R. 8 C. P. 390; *Mitchell v. Alestree*, 1 Ventr. 295. *W. P. P. Ry. v. Mulhair*, 6 Weekly Notes of Cases (Penna.) 508, is not consistent with the authorities.

action to recover damages for injuries alleged to have been caused by a railway's negligence, if it appears that the injuries were occasioned by either one of two causes, for one of which the railway is responsible, but not for the other, the plaintiff cannot recover, for he must show affirmatively that the *causa causans* of his injury was negligence on the part of the railway, thus in *Searles v. M. Ry.*,¹ the plaintiff's injuries resulted from the fall of a burning cinder from an engine on an elevated railway upon the plaintiff, who was on the street below, but the proof failed to show whether the cinder came from the smoke stack, which was in good order and guarded by a spark arrester, or from the fire box, which was not shown to be out of repair, and the court, therefore, entered judgment for the railway. It is not necessary that the party on whom the burden of proof rests should establish a case free from any doubt, and it is sufficient to justify a verdict for him that the evidence preponderates in his favour, and that the jury would not act unreasonably in finding a verdict for him.²

II. THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.

It is held in some jurisdictions that the burden is also upon the plaintiff of showing affirmatively that the person injured was not contributorily negligent, but the general rule seems to be that, if the plaintiff's case has shown the railway to have been negligent, and the railway relies upon contributory negligence as a defenee, the burden is on the railway of proving that contributory negligence.

374. While all of the authorities agree that the burden is upon the plaintiff of showing that the de-

¹ 101 N. Y. 661.

² *Johnson v. Agricultural Ins. Co.*, 25 Hun 251; *N. Y., L. E. & W. R. R. v. Seybolt*, 95 N. Y. 562.

fendant was negligent, or, in other words, that the injury resulted *prima facie* from the negligence of the defendant, it is nevertheless held in some jurisdictions that the burden is on the plaintiff of showing affirmatively that the person injured¹ was without fault, but that that may be shown, either by direct evidence or by proof of circumstances reasonably establishing that the injury may have been occasioned without contributory negligence upon the part of the person injured.¹ Other authorities hold that if the plaintiff's case has shown that under the circumstances the defendant owed him a duty, and that that duty has not been performed, and that the injury has resulted therefrom, the obligation is then upon the defendant to prove plaintiff's contributory negligence, if he relies upon that contributory negligence as a defence to the action.² So far as re-

¹ Per Brett, M. R., in *Davey v. L. & S. W. Ry.*, 12 Q. B. D. 71; *Murphy v. Deane*, 101 Mass. 466; *Mayo v. B. & M. R. R.*, 104 Id. 137; *Hinckley v. C. C. R. R.*, 120 Id. 262; *Tolman v. S. B. & N. Y. R. R.*, 98 N. Y. 198; *Lee v. Troy Co.*, Id. 115; *Warren v. F. R. R.*, 8 Allen 227; *Gleason v. Bremen*, 50 Me. 222; *State v. G. T. Ry.*, 58 Id. 176; *State v. M. C. R. R.*, 76 Id. 357, 19 Am. & Eng. R. R. Cas. 313; *Pzolla v. M. C. R. R.*, 54 Mich. 273, 19 Am. & Eng. R. R. Cas. 334; *Murphy v. C. R. I. & P. R. R.*, 45 Iowa 661; *Starry v. D. & S. W. R. R.*, 51 Id. 419; *Raymond v. B. C. R. & N. Ry.*, 65 Iowa 152, 18 Am. & Eng. R. R. Cas. 217, reversing s. c., 13 Id. 6; *Behrens v. K. P. Ry.*, 5 Col. 400, 8 Am. & Eng. R. R. Cas. 184; *Penna. Co. v. Galentine*, 77 Ind. 320, 7 Am. & Eng. R. R. Cas. 517; *P. C. & St. L. R. R. v. Noel*, 77 Ind. 110, 7 Am. & Eng. R. R. Cas. 524; *T. W. & W. Ry. v. Branagan*, 75 Ind. 490, 5 Am. & Eng. R. R. Cas. 630; *Hawes v. B. C. R. & N. R. R.*, 64 Iowa 315, 19 Am. & Eng. R. R. Cas. 220; *L. N. A. & C. Ry. v. Shanks*, 94 Ind. 598, 19 Am. & Eng. R. R. Cas. 28.

² *D. W. & W. Ry. v. Slattery*, 3 App. Cas. 1155; *W. & G. Ry. v. Gladmon*, 15 Wall. 401; *L. & St. L. R. R. v. Horst*, 93 U. S. 291; *Oldfield v. N. Y. & H. R. R.*, 14 N. Y. 310; *Johnson v. H. R. R. R.*, 20 Id. 65; *Button v. H. R. R. R.*, 18 Id. 248; *Wilds v. H. R. R. R.*, 24 Id. 230; *Buesching v. Gas-Light Co.*, 73 Mo. 229; *Sweigert v. H. & St. J. R. R.*, 75 Id. 475; *Waters v. Wing*, 59 Penna. St. 213; *Canal Co. v. Bentley*, 66 Id. 32; *P. R. R. v. Weber*, 76 Id. 157; *K. C. St. J. & C. B. R. R. v. Flynn*, 78 Mo. 195, 18 Am. & Eng. R. R. Cas. 23; *D. & W. R. R. v. Spicker*, 61 Tex. 427, 21 Am. & Eng. R. R. Cas. 160; *P. R. R. v. McTighe*, 46 Penna. St. 316; *P. R. R. v. Warner*, 89 Id. 59; *C. & P. R. R. v. Rowan*, 66 Id. 393; *Abbett v. C. M. & St. P. Ry.*, 30 Minn. 482; *Mares v. N. P. R. R. Dak.*, 17 Am. & Eng. R. R. Cas. 620; *Wilson v. N. P. R. R.*, 26 Minn.

gards the burden of proof, the conflict of authority on this question is not of material importance, for the plaintiff, under either line of authorities, is entitled to go to the jury when he has proven an injury to himself caused by negligence on the part of the defendant, without any obvious want of care on his own part, but the variance between the cases is, as shown in the next chapter, of importance as regards the presumption of contributory negligence, and, upon principle, it seems to be much more reasonable to throw on the railway the burden of proving that which only becomes a material issue in the cause when negligence upon its part has been proved.

278; *McQuilken v. C. P. R. R.*, 50 Cal. 7; *MacDougall v. C. Ry.*, 63 Cal. 431, 12 Am. & Eng. R. R. Cas. 143; *P., C. & St. L. Ry. v. Wright*, 80 Ind. 182, 5 Am. & Eng. R. R. Cas. 628.

CHAPTER VI.

PRESUMPTIONS.

- I. The presumption as to negligence.
- II. The presumption as to contributory negligence.
- III. Certain minor presumptions.

I. THE PRESUMPTION OF NEGLIGENCE.

There is a rebuttable presumption of negligence on the part of the railway in the case of an injury caused by circumstances from which may fairly be inferred a non-performance of duty on the part of the railway.

375. In some cases “the very nature of the accident may of itself, and through the presumption it carries, supply the requisite proof;”¹ thus where circumstances are proven from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the railway might, and ought to, have resorted to, there is, in the absence of explanation by the railway, a presumption of negligence upon its part, or, as the rule is put in *Scott v. L. & St. K. Docks Co.*,² “where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation, that the accident arose from want of care.” In *W. T. Co. v. Downer*,³ Field, J., thus states the rule: “a presumption of negligence

¹ Wharton on the Law of Negligence, Par. 421.

² 3 H & C. 596.

³ 11 Wall. 129.

from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement, or misconstruction, of a thing over which the defendant has immediate control, and for the management, or construction, of which he is responsible.”¹ This rule was first applied in cases where passengers were injured by the breaking of the axle of a coach,² or by the careless driving of a coach,³ or by the coming off of a wheel of a coach.⁴ This presumption has been held to furnish proof of negligence in cases of collision between two trains operated by the same railway,⁵ in the case of a collision between two street cars,⁶ in the case of collision between a train which leaves the main line and cars on a siding,⁷ in the case of the explosion of the boiler of a locomotive engine,⁸ in cases of the derailment of railway cars,⁹ in the case of the giving way of an embank-

¹ See also *R. R. v. Mitchell*, 11 Heisk. 400.

² *Christie v. Griggs*, 2 Camp. 79. ³ *Stokes v. Saltonstall*, 13 Pet. 181.

⁴ *Ware v. Gay*, 11 Pick. 106.

⁵ *Skinner v. L. B. & S. C. Ry.*, 5 Ex. 787; *I. R. R. v. Mowery*, 36 Ohio St. 418, 3 Am. & Eng. R. R. Cas. 361; *N. O., J. & G. N. R. R. v. Allbritton*, 38 Miss. 242.

⁶ *Smith v. St. P. C. Ry.*, 32 Minn. 1, 16 Am. & Eng. R. R. Cas. 310.

⁷ *N. Y., L. E. & W. R. R. v. Seybolt*, 95 N. Y. 562, 18 Am. & Eng. R. R. Cas. 162.

⁸ *Robinson v. N. Y. C. & H. R. R.*, 20 Blatchf. 338.

⁹ *Carpue v. L. & B. Ry.*, 5 Q. B. 747, 48 E. C. L.; *Dawson v. M. Ry.*, 7 H. & N. 1037; *Sullivan v. P. & R. R. R.*, 30 Penna. St. 234; *N. Y., L. E. & W. R. R. v. Daugherty*, 11 Weekly Notes of Cases (Penna.) 437; *Edgerton v. N. Y. C. & H. R. R.*, 39 N. Y. 227; *Festal v. M. R. R.*, 109 Mass. 720; *George v. St. L., I. M. & S. R. R.*, 34 Ark. 613, 1 Am. & Eng. R. R. Cas. 294; *P., C. & St. L. Ry. v. Williams*, 74 Ind. 462; *C., C., C. & I. Ry. v. Newell*, 75 Id. 542; *Curtis v. R. & S. R. R.*, 18 N. Y. 534; *Tuttle v. C., R. I. & P. Ry.*, 48 Iowa 236; *Brignoli v. C. & G. E. R. R.*, 4 Daly 182; *C., B. & Q. R. R. v. George*, 19 Ill. 510. *Pollock*, C. B., in *Bird v. G. W. Ry.*, 28 L. J. Exch. 3, doubts as to the applicability of the presumption of negligence on the part of the railway in a case of simple derailment. See also *Heazle v. I. B. & W. Ry.*, 76 Ill.

ment,¹ in the case of the breaking down of a bridge,² in the case of the carrying away of a bridge by a freshet,³ in cases where by a sudden jerk in starting or stopping a car a passenger was thrown down,⁴ in a case where a passenger was injured in the course of a fight between other passengers,⁵ in a case where a passenger was injured by the fall of a berth in a sleeping-car,⁶ in a case where a passenger on a packet boat was injured by a bale of cotton negligently thrown down a hatchway by a servant of the packet company,⁷ in a case where a passenger while being carried in a car of the defendant, a street car line, was injured in a collision between that car and a railway engine, at a level crossing of the railway line and the street on which the car ran;⁸ in a case where an intending passenger having purchased a ticket, and while crossing the line at a station under the direction of a station master, was, without fault upon her part, run over by a train;⁹ in a case where the plaintiff, walking upon the highway, was injured by the fall of a barrel from the upper story of the defendant's warehouse;¹⁰ in a case where the plaintiff, an officer of

501; *Curtis v. R. & S. R. R.*, 18 N. Y. 543; *L. R. & F. S. Ry. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. R. Cas. 10; *Yonge v. Kinney*, 28 Ga. 111; *T. & St. L. R. R. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. R. Cas. 475.

¹ *G. W. Ry. v. Braid*, 1 *Moore P. C. N. S.* 101, 9 *Jur. N. S.* 339; *P. & R. R. v. Anderson*, 94 Penna. St. 251.

² *B. S. O. & B. R. R. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. R. Cas. 466.

³ *K. P. Ry. v. Miller*, 2 Colo. 442.

⁴ *N. J. R. R. v. Pollard*, 22 Wall. 341; *C. P. Ry. v. Swayne*, 13 Weekly Notes of Cases (Penna.) 41; *Ferry Co. v. Monaghan*, 10 Id. 46; *Dougherty v. M. R. R.*, 81 Mo. 325, 21 Am. & Eng. R. R. Cas. 325.

⁵ *P. & C. R. R. v. Pillow*, 76 Penna. St. 510.

⁶ *C. C. C. & I. R. R. v. Walrath*, 38 Ohio St. 461, 8 Am. & Eng. R. R. Cas. 371.

⁷ *O. & M. Packet Co. v. McCool*, Ind. , 8 Am. & Eng. R. R. Cas. 390.

⁸ *P. P. Ry. v. Weiller*, 17 Weekly Notes of Cases (Penna.) 306.

⁹ *B. & O. R. R. v. State to use of Mahone*, 63 Md. 135, 21 Am. & Eng. R. R. Cas. 202.

¹⁰ *Byrne v. Boadle*, 2 II. & C. 721.

the Custom's Service, while in the discharge of his duty, entering the defendant's warehouse, was injured by the fall of some bags of sugar from an upper story of the warehouse;¹ in a case where the plaintiff, walking on a highway under a railway bridge, was injured by the falling of a brick from an abutment, a train of the defendant's having just passed, and the bridge having been in use about three years and gaps being found in the wall from which other bricks had apparently fallen;² in a case where, in the excavation of a cellar abutting upon a highway, the cellar was left unfenced, and in the morning the dead body of the plaintiff's decedent, he being a man of proved sobriety, was found in the cellar, with no marks of violence upon him other than such as might have resulted from a fall into the cellar, and with his watch and other personal property undisturbed;³ and in a case where the dead body of the plaintiff's decedent was found after dark between the rails of the defendant's line, a train drawn by a locomotive without a headlight having recently passed, and decedent having been last seen upon the highway approaching a public crossing of the defendant's line.⁴

376. This presumption has been held to be inapplicable in the case of a person injured on a highway used as a part of a railway line by the falling upon him of the door of a passing freight car, in the absence of proof that the defect in the fastening of the door had been brought to the knowledge of the defendant, or had so long existed that that knowledge must be presumed;^b in a case where a passenger was injured by the fall of a girder of a bridge over the line upon a carriage in

^a *Scott v. L. & St. L. & K. Docks Co.*, 3 II. & C. 596.

^b *Kearney v. L. B. & S. C. Ry.*, L. R. 6 Q. B. 759.

³ *Allen v. Willard*, 57 Penna. St. 374; cf. *Lehman v. Brooklyn*, 29 Barb. 234.

⁴ *L. V. R. R. v. Hall*, 61 Penna. St. 361; *P. R. R. v. Fortney*, 90 Id. 323.

^b *Case v. C. R. I. & P. R. R.*, 64 Iowa 762, 19 Am. & Eng. R. R. Cas. 142.

motion, the girder being placed in position by a contractor engaged by a municipal corporation;¹ in a case where a passenger, while looking at a time-table on the wall of a station portico, was injured by a plank and a roll of zinc which broke through the roof of the portico and fell on him;² in a case where a passenger in driving a wagon off a ferry-boat was injured by the wheels of the wagon striking the drop of the ferry and causing the load to fall;³ in a case where a passenger was injured by having his arm crushed between the window of a street car and a passing load of hay;⁴ in a case where it was proven that the decedent, a brakeman, had fallen from a moving train and been killed, but the evidence failed to show the manner of his death or what he was doing at the time of his fall;⁵ in a case where the dead body of a man of intemperate habits was found at the end of a stormy night on a railway bridge over a street;⁶ in a case where a passenger was injured by having his arm crushed between the window of his car and an object projecting from cars at rest on another track;⁷ in a case where a passenger, while being carried in a horse car, was injured by a collision between that horse car and a train on the defendant's line;⁸ in a case where a passenger was injured in stepping down from the platform of a car;⁹ and in a case where a servant of the

¹ Daniel *v.* M. Ry., L. R. 3 C. P. 216, 591, 5 H. L. 45.

² Welfare *v.* L. & B. Ry., L. R. 4 Q. B. 693.

³ LeBaron *v.* E. B. Ferry Co., 11 Allen 312.

⁴ F. S. & P. V. R. R. *v.* Gibson, 96 Penna. St. 83.

⁵ Corcoran *v.* B. & A. R. R., 133 Mass. 507.

⁶ State, to use of Barnard *v.* P., W. & B. R. R., 60 Md. 555, 15 Am. & Eng. R. R. Cas. 481.

⁷ Holbrook *v.* U. & S. Ry., 12 N. Y. 236.

⁸ P. & R. R. R. *v.* Boyer, 97 Penna. St. 91.

⁹ D., L. & W. R. R. *v.* Napheys, 90 Penna. St. 135, 1 Am. & Eng. R. R. Cas. 52; C. St. L. & N. O. R. R. *v.* Trotter, 60 Miss. 442; Mitchell *v.* C. & G. T.

railway, while at work on a station platform, was injured by a mail bag thrown by a post-office agent from the mail car of a passing train.¹

377. The presumption of negligence in the case of an injury to a passenger under any of the circumstances above stated, is rebutted by proof of the care exercised by the railway, and it is then for the jury to find whether or not the railway was negligent.² In Georgia,³ in cases of injury to any person other than a servant of the railway, there is always a *prima facie* presumption of negligence against a railway.⁴

II. THE PRESUMPTION AS TO CONTRIBUTORY NEGLIGENCE.

In those jurisdictions where it is held that the burden is on the plaintiff of proving that he was not contributorily negligent, it is also held that there is a rebuttable presumption of contributory negligence, but in other jurisdictions where it is held that the burden is on the railway of proving the plaintiff's contributory negligence it is necessarily held that there is a rebuttable presumption that the plaintiff was not contributorily negligent.

378. In those jurisdictions where the burden is on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption necessarily is that the plaintiff was contributorily negligent,⁵ but in other jurisdictions where the burden is not on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption, of course, is that he

Ry., 31 Mich. 266, 18 Am. & Eng. R. R. Cas. 176; *cf.* *Fuller v. N. R. R.*, 21 Conn. 557.

¹ *Muster v. C. M. & St. P. Ry.*, 61 Wise. 325, 18 Am. & Eng. R. R. Cas. 113.

² *Eldredge v. M. & St. L. R. R.*, 32 Minn. 253, 21 Am. & Eng. R. R. Cas. 494.

³ Par. 3033 of the Code.

⁴ *Central R. R. v. Brinson*, 64 Ga. 475; *S. W. R. R. v. Singleton*, 67 Id. 303.

⁵ *Corcoran v. B. & A. R. R.*, 133 Mass. 507; *Riley v. C. R. R. R.*, 135 Mass.

292, 15 Am. & Eng. R. R. Cas. 181; *Chase v. M. C. R. R.*, 77 Me. 62, 19 Am.

& Eng. R. R. Cas. 356.

was not contributorily negligent.¹ This presumption is rebutted when testimony to the contrary is adduced, and the jury should be directed that if they believe the testimony they should find for the defendant.²

III. MINOR PRESUMPTIONS.

379. Certain other presumptions are recognized in some cases. Thus, where several other companies had statutory running powers over the defendant's road and defendant's train, on which the plaintiff was a passenger, was run into by a moving train through the fault of the guards of the latter, it was held that in the absence of evidence to the contrary it must be presumed that the train which caused the accident belonged to or was under the control of the defendant.³ Where a railway owns a line in operation bearing the name of the railway the presumption is that the railway operates it, and in order to relieve itself from liability for injuries caused by the negligence of the employés operating it, the burden is upon the railway to show that it does not operate the line.⁴ So, also, there is a presumption that every one riding in a railway car, intended for passengers, is there lawfully, and the *onus* is upon the carrier to prove affirmatively that such person was a trespasser;⁵ but the presumption is that an individual not in the service of the railway and riding upon a freight train is not a

¹ P. R. R. v. Weber, 76 Penna. St. 157; Weiss v. P. R. R., 79 Id. 387, 87 Id. 447; L. V. R. R. v. Hall, 61 Id. 361; C. & P. R. R. v. Rowan, 66 Id. 393; Longenecker v. P. R. R., 105 Id. 328; Schum v. P. R. R., 107 Id. 8; Buesching v. St. L. G. L. Co., 73 Mo. 229; K. C., St. J. & C. B. R. R. v. Flynn, 78 Mo. 195 18 Am. & Eng. R. R. Cas. 23.

R. & C. R. R. v. Ritchie, 102 Penna. St. 425. See sections 182, 183.

² Ayles v. S. E. Ry., L. R. 3 Ex. 146.

⁴ Ferguson v. W. C. Ry., 63 Wisc. 145, 19 Am. & Eng. R. R. Cas. 285.

⁵ P. R. R. v. Books, 57 Penna. St. 345; Creed v. P. R. R., 86 Id. 139.

passenger.¹ As emergencies necessitating the arrest of persons may be naturally expected to arise frequently in the ordinary course of a railway's business, and are of such a nature that a decision as to them must be made promptly on the company's behalf, it is a reasonable inference that the company have on the spot at their stations officers authorized to make the decision promptly for them, and where a plaintiff is arrested under the authority of a superior officer at a railway station it will, in the absence of proof to the contrary, be presumed that he had authority to act for the railway.² A person upon a train in motion acting as and wearing the uniform of a brakeman will be presumed to be a brakeman in the employment of the railway operating the train.³ A proven habit of intoxication in a conductor raises, in the case of an injury to a passenger caused by the conductor's action, a presumption of negligence.⁴ If the plaintiff has proven a physical injury it will be presumed that physical pain followed the infliction of that injury, and the existence of that pain as a substantive fact need not be proved.⁵ As a general rule there is no presumption of negligence on the part of a railway in the case of an injury to a servant of the railway.⁶

There is a conclusive presumption that the laws of nature are certain and uniform in their operation.

380. The presumptions which have been stated are all rebuttable presumptions. Certain conclusive pre-

¹ Eaton *v.* D., L. & W. R. R., 57 N. Y. 382; Waterbury *v.* N. Y. C. & H. R. R. R., 17 Fed. Rep. 671.

² Giles *v.* T. V. Ry., 2 El. & Bl. 822, 75 E. C. L.; Goff *v.* G. N. Ry. 3 E. & E. 672, 107 E. C. L.

³ Hughes *v.* N. Y. & N. H. R. R., 36 N. Y. Sup. Ct. 222; Hoffman *v.* N. Y. C. & H. R. R. R., 44 Id. 1.

⁴ P. R. R. *v.* Books, 57 Penna. St. 345; H. & B. T. R. R. *v.* Decker, 84 Id. 424.

⁵ C. B. & Q. R. R. *v.* Warner, 108 Ill. 538, 18 Am. & Eng. R. R. Cas. 100.

⁶ T. W. & W. Ry. *v.* Moore, 77 Ill. 217; I. C. Ry. *v.* Houck, 72 Id. 286.

sumptions, however, have been recognized in the cases; thus the accuracy and certainty of the operation of the laws of nature is presumed and testimony cannot be received to contradict those laws,¹ or to prove a manifest impossibility, as that a car could, within a few yards from a position of rest, attain a high rate of speed.²

¹ *Briggs v. Taylor*, 28 Vt. 180.

² *Cauley v. P. C. & St. L. Ry.*, 98 Penna. St. 498.

CHAPTER VII.

THE RESPECTIVE PROVINCES OF THE COURT AND THE JURY.

- I. Negligence and contributory negligence as questions of fact.
- II. The duty of the judge.

I. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE AS QUESTIONS OF FACT.

Negligence and contributory negligence are questions of fact to be determined by the jury.

381. The maxim of the common law is, “*ad questionem juris respondent judices; ad questionem facti respondent juratores.*” Every one concedes the soundness of the general principle thus tersely stated, but there is often a difference of opinion in the trial of causes as to the real nature of the issue, and consequently as to the character of the tribunal whose decision is to conclude it. In actions for the recovery of damages for injuries to the person, it is generally for the jury to determine whether the defendant was negligent or the plaintiff was contributorily negligent;¹ that is, whether either party failed to exercise that degree of care which the

¹ *Crofts v. Waterhouse*, 3 Bing. 319, 11 E. C. L.; *McCully v. Clarke*, 40 Penna. St. 406; *W. & A. R. R. v. King*, 70 Ga. 261, 19 Am. & Eng. R. R. Cas. 255; *Wright v. G. R. R.*, 34 Ga. 337; *P. & C. R. R. v. Andrews*, 39 Md. 343; *McMahon v. N. C. Ry.*, Id. 449; *P. R. R. v. State, to use of McGirr*, 61 Id. 108, 19 Am. & Eng. R. R. Cas. 326; *P. & R. R. R. v. Killips*, 88 Penna. St. 412; *Schum v. P. R. R.*, 107 Id. 8; *Bell v. H. & St. J. R. R.*, 72 Mo. 50, 4 Am. & Eng. R. R. Cas. 580; *Guggenheim v. L. S. & M. S. R. R.*, — Mich. —, 22 Am. & Eng. R. R. Cas. 546; *Penna. Co. v. Hens'l*, 70 Ind. 569, 6 Am. & Eng. R. R. Cas. 79.

circumstances of the case demanded, for the inquiry necessitates, in the words of Strong, J., in *McCully v. Clarke*,¹ an ascertainment of "both the duty and the extent of performance." In order to reach a result the jury have not only to consider the acts and omissions of the parties, but they must also draw all the inferences which directly result from those acts and omissions, for, in general, the negligence of one party or the other is, as Dr. Wharton has pertinently said,² not "the subject of direct proof, but an inference from facts put in evidence."

II. THE DUTY OF THE JUDGE.

It is the duty of the judge to submit for the determination of the jury only those issues which are not concluded and agreed upon either by the pleadings, or by express admissions of the parties, or by the tacit admissions of the parties in their conduct of the cause; and before submitting those issues, it is the duty of the judge to determine whether as to each issue competent evidence has been produced, which, if believed by the jury, will justify men of reasonable minds in finding a verdict in favour of the party upon whom rests the burden of proof in that particular issue.

382. Lord Blackburn has clearly pointed out, in his judgment in *D., W. & W. Ry. v. Slattery*,³ that it is the function of the jury to determine only those facts which are the subject of controversy, and, therefore, where any facts, and the necessary inferences to be drawn from them, are expressly admitted, either by the effect of the pleadings, or by a formal admission at the trial, or are tacitly admitted "by such a conduct of the cause as is equivalent to such an admission," it is not necessary to take the opinion of the jury thereon, but it is the duty of the judge to decide as to their

¹ 40 Penna. St. 406.

² Law of Negligence 354.

³ 3 App. Cas. 1201.

legal effect. Therefore, upon the issue of the defendant's negligence when the plaintiff has put in all the legally admissible testimony which his counsel sees proper to introduce, and upon the issue of the plaintiff's contributory negligence, when the plaintiff's case has not shown him to have been contributorily negligent, and when the defendant has put in all the evidence which his counsel sees proper to introduce, it becomes the duty of the judge to determine whether a jury of reasonable men, believing that testimony, giving full weight to it, and drawing all the inferences from it, would be justified in finding a verdict for the party who has produced that evidence, for as Williams, J., said in Adams Express Co. v. Sharpless:¹ "the jury cannot find negligence from facts and circumstances which do not tend to show want of reasonable and ordinary care, any more than they can find any other facts without competent and sufficient evidence." It was formerly the doctrine that a question of fact must necessarily be submitted to the jury, if it were supported by no more than a mere scintilla of evidence, but the later cases have adopted a more reasonable rule, which has been stated by different judges in different words, but to the same effect. Thus, in Jewell v. Parr,² Maule, J., said: "applying the maxim, *de minimis non curat lex*, when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established." In Toomey v. L. B. & S. C. Ry.,³ Williams, J., said: "it is not enough to say that there was *some* evidence, for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway com-

¹ 77 Penna. St. 522.

² 13 C. B. 909, 76 E. C. L.

³ 3 C. B. N. S. 149, 91 E. C. L.

pany could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." In *Ryder v. Wombwell*,¹ Willes said: "there is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant." In *Bridges v. N. L. Ry.*,² the judges having been called in, Pollock, B., said, referring to *Ryder v. Wombwell*: "this is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence, or no negligence, is usually one of pure fact, and, therefore, for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present a hypothesis which comes within that legal definition, then to withdraw them from their consideration." The Lords, who decided *Bridges'* case, having held that upon the facts there was evidence of negligence to go to the jury, but not in express terms either approving of or dissenting from the rule as laid down in *Ryder v. Wombwell*, there not unnaturally followed some misapprehension as to the proper course to be pursued by a judge in directing

¹ L. R. 4 Ex. 32.

² L. R. 7 H. L. 213.

a jury upon a question of negligence. In *Robson v. N. E. Ry.*,¹ Coleridge, C. J., intimated that the effect of Bridges' case was that "if there was any evidence at all, it is for the jury and not for the judge to say whether there was negligence on the part of the company;" and Brett, J., added² that, "as the carrying of passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide;" and in *Jackson v. Metropolitan Ry.*,³ Amphlett, J. A., said: "it is now settled by the case of *Bridges v. N. L. Ry.* (though previously doubted by many eminent judges), that the question whether in cases of this sort negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the court, or the presiding judge." But when Jackson's case came before the House of Lords,⁴ Cairns, L. C., and Lords O'Hagan, Blackburn, and Gordon concurred in holding that Bridges' case did not have the effect attributed to it of qualifying the rule in *Ryder v. Wombwell*, Cairns, L. C., saying:⁵ "the judge has a certain duty to discharge and the jury have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether from those facts when submitted to them negligence *ought to be inferred*," and Lord Blackburn adding: "on a trial by jury I conceive, undoubtedly, that the facts are for the jury and the law for the judge. * * * It has always been considered a question of law, to be determined by the judge, subject, of course, to review, whether there is evidence which if it is believed, and the contrary evidence, if any, is not believed, would establish

¹ 2 Q. B. D. 87.

² P. 89.

³ L. R. 2 C. P. D. 127.

⁴ 3 App. Cas. 193.

⁵ P. 197.

the fact in controversy. It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, whether from those facts that farther inference legitimately may be drawn." In *D. W. & W. Ry. v. Slattery*,¹ the rule as thus defined, was reasserted. Lord Coleridge, however,² doubted the practical efficacy of the rule, saying: "to me the uselessness of such rules as practical guides lies in the inherent vagueness of the word 'reasonable,' the absolute impossibility of finding a definite standard to be expressed in language, for the fairness and reason of mankind, even of judges. The reason and fairness of one man is manifestly no rule for the reason and fairness of another, and it is an awkward, but so far as I can see, an inevitable consequence, of the rule, that in every case where the decision of a judge is overruled, who does or does not stop a case on the ground that there is, or is not, reasonable evidence for reasonable men, those who overrule him say, by implication, that in the case before them the judge who is overruled is out of the pale of reasonable men. The same is true of a whole court, the decision of which, in a case of this sort, is reversed upon appeal." But this criticism, eminent as is the source from whence it proceeds, would seem to be answered by the observations of Mellor, J., and of Lord Blackburn. The former said, in *Ryder v. Wombwell*:³ "there is no doubt a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the

¹ 3 App. Cas. 1155.

² L. R. 4 Ex. 42.

³ P. 1197.

judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so, either in the court above or in the court below. This is an infirmity which must affect all tribunals.” The latter, after quoting the statement of Mellor, J., added, in *Metropolitan Ry. v. Jackson*:¹ “I quite agree that this is so, and it is an evil. But I think it a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner.”

383. One of the best expositions of the rule is that which was given by Miller, J., in the Supreme Court of the United States, in *Pleasants v. Fant*,² where that learned judge says: “it is the duty of a court in its relation to the jury, to protect a party from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in those issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence, or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support, or justify, a verdict in his favour. Not whether on all the evidence the preponderating weight is in his favour, that is the business of the jury, but conceding to all the evidence the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient

¹ 3 App. Cas. 208.

² 22 Wall. 121.

to justify a verdict? If it is not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the whole ceremony in such a case, of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind, that if the jury should find a verdict in favour of the plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury can justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." This doctrine, in itself so obviously reasonable and so conducive to the right administration of justice, has been asserted in many other cases.¹

¹ *Jewell v. Parr*, 13 C. B. 909, 76 E. C. L.; *Wheelton v. Hardisty*, 8 E. & Bl. (92 E. C. L.) 232; *Bridges v. N. L. Ry.*, L. R. 7 H. L. 213; *Robson v. N. E. Ry.*, L. R. 2 Q. B. D. 87; *Metropolitan Ry. v. Jackson*, L. R. 3 App. Cas. 193; *D. W. & W. Ry. v. Slattery*, Id. 1170; *Pawling v. U. S.*, 4 Cranch 221; *U. S. Bank v. Smith*, 11 Wheaton 179; *Parks v. Ross*, 11 Howard 373; *Schuchardt v. Allen*, 1 Wallace 368; *Merchants' Bank v. State Bank*, 10 Id. 604; *Improvement Co. v. Munson*, 14 Id. 442; *Bowditch v. Boston*, 101 U. S. 16; *Randall v. B. & O. R. R.*, 109 Id. 478; *Hughes v. Boyer*, 9 Watts. 556; *Germantown P. Ry. v. Walling*, 97 Penna. St. 55; *Central R. R. v. Feller*, 84 Id. 229; *Amer. S. S. Co. v. Bryan*, 83 Id. 448; *P., W. & B. R. R. v. Stinger*, 78 Id. 219; *Crissey v. Hestonville P. Ry.*, 75 Id. 83; *Phila. P. R. v. Hassard*, Id. 376; *McKee v. Bidwell*, 74 Id. 223; *Giblin v. McMullen*, L. R. 2 P. C. 335; *L. V. R. R. v. McKeen*, 90 Penna. St. 122; *Demy v. Williams*, 5 Allen 1; *Brooks v. Somerville*, 106 Mass. 271; *Penna. Canal Co. v. Bentley*, 66 Penna. 34; *Howard Express Co. v. Wile*, 64 Id. 201; *P. & R. R. R. v. Schertle*, 97 Id. 450; *Hyatt v. Johnston*, 91 Id. 196; *Longenecker v. P. R. R.*, 105 Id. 328; *Hoye v. C. & N. W. Ry.*, 62 Wisc. 666, 19 Am. & Eng. R. R. Cas. 347; *Spensley v. Insurance Co.*, 54 Wisc. 433; *Sabotta v. Insurance Co.*, 54 Id. 687; *Fitts v. C. C. Ry.*, 59 Wisc. 325, 15 Am. & Eng. R. R. Cas. 462; *C. P. Ry. v. Foxley*, 107 Penna. 537; *Hogan v. C. M. & St. P. Ry.*, 59 Wisc. 139, 15 Am. & Eng. R. R. Cas. 439; *Dietrich v. B. & H. S. Ry.*, 58 Md. 347, 11 Am. & Eng. R. R. Cas. 115; *Carter v. C. & G. R. R.*, 19 Shand. (S. C.) 20, 15 Am. & Eng. R. R. Cas. 414; *Finney v. N. P. Ry.*, Dak. 12 Am. & Eng. R. R. Cas. 17; *P. R. R. v. Fortney*, 90 Penna. St. 324, 1 Am. & Eng. R. R. Cas. 129; *Abbett v. C. M. & St. P. Ry.*, 30 Minn. 482; *Montclair v. Dana*, 107 U. S. 162; *Anderson County v. Beal*, 113 U. S. 227; *Baylis v. Travellers' Insurance Co.*, 113 U. S. 316; *Marshall v. Hubbard*, 117 U. S. 415.

384. Negligence being a question of fact for the jury, it necessarily follows that no possible act of either commission or omission on the part of either the plaintiff or the defendant can, with logical accuracy, be characterized as *per se* negligent, but all that can be predicated of any such act, when found or admitted as a fact, is, that it is so obviously negligent, that a jury would not be reasonable if they found it not to be negligence, and that, therefore, it is the duty of the judge to so direct the jury, and, if they find against his direction, to grant a new trial. The practical application of the rule in the trial of actions against railways for injuries to the person, therefore, is, that, before submitting the issue to the consideration of the jury, the judge must determine whether or not the party on whom the burden of proof lies has, according to the rules of evidence, proved facts, which, although not necessarily satisfactory to the mind of the judge, would justify a jury of reasonable men in finding a verdict in favour of that party; thus, if the issue be taken upon the negligence of the defendant, the question for the determination of the judge is, whether or not the evidence produced on behalf of the plaintiff, admitting its truth, stating it fairly, and drawing from it all the inferences that reasonably can be drawn from it, is such that the jury may reasonably find a verdict for the plaintiff. If the evidence does not amount to this, it is the duty of the judge to nonsuit the plaintiff or to direct a verdict for the defendant. If the issue be taken upon the plaintiff's contributory negligence, the judge must determine whether the testimony upon behalf of the plaintiff proves him to have been contributorily negligent. If that testimony does have that effect, it is the duty of the judge to nonsuit the plaintiff or to direct a verdict for the defendant. If the plaintiff's case has not de-

veloped contributory negligence, and the testimony produced upon the part of the defendant, admitting its truth and drawing all the inferences that can reasonably be drawn from it does have that effect, it is then the duty of the judge to submit the question of contributory negligence to the jury; but, if the testimony offered by the defendant to establish the plaintiff's contributory negligence is not sufficient, conceding its truth and drawing the inferences from it, to justify a verdict for the defendant upon that issue, it is the duty of the judge to direct the jury that the plaintiff has not been shown to have been contributorily negligent. It must be remembered that it is for the jury, and not for the judge, to pass upon the credibility of witnesses. It is, therefore, not competent for the judge to direct a verdict for the plaintiff upon the issue of the defendant's negligence, when the evidence to establish that negligence has been produced upon behalf of the plaintiff, nor to direct a verdict for the defendant upon the issue of the plaintiff's contributory negligence, when the evidence to prove that contributory negligence has been produced upon behalf of the defendant, because, in either case, the jury may not believe the witnesses, and it is only when the truth of the testimony can be assumed that the judge is authorized to direct a verdict, for the direction of a verdict amounts to a statement that, admitting the truth of the testimony produced to support the issue, that testimony is not legally sufficient to support it. This view is illustrated by *Baylis v. Traveller's Ins. Co.*,¹ in delivering judgment, in which case, Matthews, J., said: "without a waiver of the right of trial by jury by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the

¹ 113 U. S. 316.

effect of the evidence, finds the facts involved in the issue, and renders judgment thereon."

385. No one can carefully study the cases against railways for injuries to the person as reported in the books, or observe the trials of such causes in the courts, without coming to the conclusion that there is often a miscarriage of justice, for, as Lord Blackburn said,¹ the real question seems often to be "whether it was not shabby in the railway company not to give something to the widow and orphans of the deceased." It is common to attribute that result to the prejudices of jurors. But a careful consideration of the details of any such case will show that, more frequently, the real cause of the failure to do substantial justice is the inability of the judge at the trial to properly control the jury. Better results would undoubtedly be attained if the judges would submit specific questions for the determination of the jurors so framed as to elicit a distinct finding as to the particular act of negligence upon the part of the defendant, or of contributory negligence upon the part of the plaintiff.² In jurisdictions where this course upon the part of the judge is not permissible, or, if permissible, not expedient, he may nevertheless, if he be intelligent, courageous, of sufficient decision of character, and, in one word, competent, prevent, by the application of the rules of evidence, the minds of the jury from being diverted from the true point of inquiry, and submitting questions to them only upon adequate proof, and in his charge putting clearly and unmistakably before them the precise questions of fact which it is their province to determine, and by his

¹ D., W. & W. Ry. v. Slattery, L. R. 3 App. Cas. 1162.

² The technicalities required in special verdicts under the common law render them inadvisable. See P., F. W. & C. R. R. v. Evans, 53 Penna. St. 250; P., C. & St. L. R. R. v. Spencer, 93 Ind. 186, 21 Am. & Eng. R. R. Cas. 478.

instructions upon the law, conveyed in clear terms and laid down with firmness and decision, he may save them from being swayed by extraneous circumstances and from misapprehending the question in the cause, the evidence relevant to it, or the rule of law controlling their decision, and if they should fail to obey his ruling as to the law, or should disregard the evidence, he can, by the granting of a new trial, prevent injustice.

CHAPTER VIII.

DAMAGES.

- I. Damages for breaches of contract.
- II. Damages for torts.
- III. Exemplary damages.
- IV. The measure of damages in cases of injuries not causing death.
- V. The measure of damages in cases of injuries causing death.
- VI. Statutory limitations of damages.

I. DAMAGES FOR BREACHES OF CONTRACT.

Where the action is grounded upon the railway's breach of a contract of carriage, damages are recoverable for such injuries as naturally result from the breach of contract, and for such other injuries as may be supposed to have been in the contemplation of both parties at the time of the making of the contract as a probable result of its breach.

386. Where the action is grounded upon the railway's breach of a contract of carriage, the damages recoverable are such as may fairly and reasonably be considered as either naturally arising, that is, arising according to the usual course of things from such breach of contract itself, or such as may be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.¹ If the plaintiff seeks to recover special damages beyond those which may be supposed to have been in the contemplation of both parties at the time of the making of the contract as a probable result of a breach of it, it is necessary that the circumstances upon

¹ Hobbs v. L. & S. W. Ry., L. R. 10 Q. B. 111; Quimby v. Vanderbilt, 17 N. Y. 306; Trigg v. St. L., K. C. & N. Ry., 74 Mo. 147, 6 Am. & Eng. R. R. Cas. 345.

which the claim for special damages is founded should have been, before the making of the contract, brought to the attention of the other contracting party;¹ and in order that the notice of such special circumstances should give the right of recovery of special damages, it is necessary that those circumstances should be such that the making of the contract with notice of those circumstances amounts to an actual engagement on the part of the defendant to bear the exceptional loss.² In *Hamlin v. G. N. Ry.*,³ the defendant had contracted to carry the plaintiff by train from London to Grimsby, and thence by a connecting train to Hull, and upon his arrival at Grimsby, there being no train to take him to Hull as there should have been according to the contract, he was compelled to stay at Grimsby over night and to pay 1s. 4d. for his fare to Hull, and he arrived at Hull too late to take a train to another place to which he had intended to go on business, but which intention he had not communicated to the railway. At the trial the judge directed the jury that the plaintiff was entitled to recover only for the cost of his stay at Grimsby and his fare to Hull, but that, not having communicated to the railway his intention of proceeding beyond Hull, he could not recover damages for having been prevented from so doing, and after a ver-

¹ *Hadley v. Baxendale*, 9 Ex. 341; *Hamlin v. G. N. Ry.*, 1 H. & N. 408; *Fletcher v. Tayleur*, 17 C. B. 21, 84 E. C. L.; *Le Peintur v. S. E. Ry.*, 2 L. J. N. S. 170; *G. W. Ry. v. Redmayne*, L. R. 1 C. P. 329; *Griffen v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 Id. 72; *Krom v. Levy*, 48 Id. 679; *Crater v. Bininger*, 33 N. J. L. 513; *Fessler v. Love*, 43 Penna. St. 313; *Adams Express Co. v. Egbert*, 36 Id. 360; *Pittsburg Coal Co. v. Foster*, 59 Id. 365; *Wolf v. Studebaker*, 65 Id. 459; *Phelan v. Andrews*, 52 Id. 486; *Smead v. Foord*, 1 El. & El. 602, 102 E. C. L.; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L.; *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422; *Wilson v. The N. Dock Co.*, L. R. 1 Ex. 177; *M. & C. R. R. v. Green*, 52 Miss. 779.

² *Horne v. Midland Ry.*, L. R. 8 C. P. 131; *Gee v. L. & Y. Ry.*, 6 H. & N. 211.

³ 1 H. & N. 408.

diet for the plaintiff with 5s. damages, a rule, which was moved for on behalf of the plaintiff, was refused. So in *Burton v. Pinkerton*,¹ the defendant having engaged the plaintiff to serve as a mariner for twelve months on a merchant ship, from London to Rio and other ports, and the plaintiff having left the ship at Rio because she was employed in the naval service of the Peruvian government, then at war with Spain, brought his action for his wages under the contract, and also for the recovery of damages for his imprisonment at Rio as a deserter, and for the loss of clothes of which the defendant had deprived him. The jury having found for the plaintiff in the sum of £12 10s. for loss of wages and £50 damages for his imprisonment and loss of clothes, a rule was made absolute for a new trial for the £50 damages, Bramwell, B., saying : "it is true that in one sense the defendant's conduct caused the imprisonment; but for that no doubt the plaintiff would not have been imprisoned. That, however, is not enough. Suppose, for instance, the plaintiff had met robbers while ashore, and had been injured by them, he certainly could have recovered nothing from the defendant for such injury, yet the defendant might in that case also be said to have caused the damage. According to the ordinary rule, damage, to be recoverable by a plaintiff, must inevitably flow from the *tortius act* of the defendant. It must be caused by him as the *causa causans*, and this imprisonment was not so caused." So in *G. W. Ry. v. Redmayne*,² where the railway had broken its contract to carry certain goods to Cardiff, and to deliver them at a certain time, and the plaintiff lost the profits of their sale because the plaintiff's agent, to whom they were to have been delivered for sale, had

¹ L. R. 2 Ex. 340.

² L. R. 1 C. P. 329.

left Cardiff before the goods arrived, it was held that in the absence of notice to the railway of the purpose for which the goods were sent such profits could not be recovered as damages for the delay. So in *Woodger v. G. W. Ry.*,¹ where a commercial traveller had delivered to the railway certain samples of goods to be carried to Liverpool, but did not state the purpose for which the goods were required at Liverpool, and the goods being delayed the commercial traveller waited three days unemployed at Liverpool, it was held that his hotel expenses there could not be recovered as damages. So in *Horne v. M. Ry.*,² where the plaintiffs, being shoe manufacturers at Kettering, and having contracted to deliver at a day certain a quantity of shoes to a firm in London, for the use of the French army, at a price largely in excess of the market price, delivered the shoes to the railway at Kettering in sufficient time for their transportation to and delivery in London under the contract, and gave notice to the railway that the plaintiffs had contracted to deliver the shoes in London at a stated time, and that unless delivered they would be thrown on their hands; the shoes not having been delivered in time, and not being accepted, and being sold by the plaintiffs at the market rate, which was much lower than the contract price, it was held in the Exchequer Chamber that, the railway not having been informed of the exceptional character of the contract, the difference between the market rate and the contract price could not be recovered as damages naturally arising from their breach of contract. So in *Gee v. L. & Y. Ry.*,³ it was held that a railway was not liable, by reason of its breach of a contract to deliver cotton to a manufacturer at a time certain, to compensate him for the wages paid to hands who were kept in idleness,

¹ L. R. 2 C. P. 318.

² L. R. 8 C. P. 131.

³ 6 H. & N. 211.

and for the profits he could have made if he had had the cotton to work, no notice having been given to the railway that the mill would be stopped if the cotton were not delivered. So in *Hobbs and wife v. L. & S. W. Ry.*,¹ the defendant having broken its contract to carry the plaintiffs by train to Hampton Court, and having set them down after midnight of a rainy night at a station some miles away, where the plaintiffs could not obtain accommodation at an inn, nor secure any means of conveyance to their home, and being compelled to walk to their home, the wife caught cold and was ill for some time thereafter, and expenses were incurred for medical attendance. The jury having found for the plaintiffs, and assessed as damages (in addition to £2 paid into court by the railway) £8 in respect of the plaintiff's inconvenience, and £20 in respect of the wife's illness and its consequences, a rule for a new trial was discharged as to the £8 and made absolute as to the £20, Cockburn, C. J., saying: "now, inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavoured to be argued, upon principle and upon authority, that this was a kind of damage which could not be supported; and attempts were also made to satisfy us that this supposed inconvenience was more or less imaginary, and would depend upon the strength and constitution of the parties, and various other circumstances; and that it is not to be taken that a walk of so many additional miles would be a thing that a person would dislike or suffer inconvenience from; and that there may be circumstances under which a walk of several miles, so far from being matter of inconven-

ience, would be just the contrary. All that depends on the actual facts of each individual case; and if the jury are satisfied that, in the particular instance, personal inconvenience, or suffering, has been occasioned, and that it has been occasioned as the immediate effect of the breach of the contract, I can see no reasonable principle why that should not be compensated for. * * * * To entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore, you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage, or injury, complained of. To illustrate that, I cannot take a better case than the one now before us; suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. As my brother Blackburn points out, so far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within

the contemplation of the parties; because, if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there, he may take those means and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately, that the damage resulting must be admitted to be fair subject-matter of damages. But in this case, the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary, but the secondary, consequence of it; and if in such a case the party recovered damage by reason of the cold caught incidentally on that foot journey, it would be necessary, on the principle so applied, to hold that in the two cases which have been put in the course of the discussion, the party aggrieved would be equally entitled to recover. And yet the moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: suppose in walking home on a dark night, the plaintiff made a false step and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that this is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or, indeed, a great many more

times, from Esher to Hampton, without falling down and breaking a limb; therefore, it could not be contended that that could have been anticipated as the likely and probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns, or breaks down, and the party sustains bodily injury from either of these causes, it might be said: ‘if you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk, or to go, from Esher to Hampton in a carriage, and I should not have met with the accident in the walk, or in the carriage.’ In either of those cases the injury is too remote, and I think that is the ease here; it is not the necessary consequence, it is not even the probable consequence, of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences.” In *Francis v. St. L. T. Co.*,¹ the facts were similar to those in Hobb’s case, and a like conclusion was reached by the court.²

387. There are, however, some reported cases in which passengers have been permitted to recover as damages, for the breach by a railway of its contract of carriage, compensation for illness following upon a walk taken by the passenger in consequence of the

¹ 5 Mo. Ap. Cas. 7.

² See also *Walsh v. C., M. & St. P. Ry.*, 42 Wisc. 23; *L. & N. R. R. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. R. Cas. 347; *Lewis v. F. & P. M. Ry.*, 54 Mich. 55, 18 Am. & Eng. R. R. Cas. 263; *St. L., K. C. & N. R. R. v. Trigg*, 74 Mo. 147, 6 Am. & Eng. R. R. Cas. 345; *St. L., K. C. & N. R. R. v. Marshall*, 78 Mo. 610, 18 Am. & Eng. R. R. Cas. 248; *Morse v. Duncan*, U. S. C. C. S. D. Miss., 8 Am. & Eng. R. R. Cas. 374.

railway's breach of contract;¹ but there is, in the judgments in these cases, nothing which answers the reasoning so forcibly put by Cockburn, C. J., in Hobb's case.

388. Upon the same principle, a passenger, whose contract of carriage has been broken by the failure of the railway, through the arrival of its train too late to make an advertised connection, cannot recover the cost of a special train, where he had no business at the point of destination which would have induced him to incur such an expenditure at his own cost;² nor can a plaintiff, who sues in an action sounding in contract, recover damages from the railway for indignities inflicted upon him by the police, for a cold caught while confined, and for mental suffering, following a wrongful arrest by the railway's servants.³ So, in *Theobald v. Ry. Passengers Assurance Co.*,⁴ the plaintiff, in stepping from a railway carriage at a station, slipped and fell without fault upon his part, and brought suit against the defendant on a policy covenanting that £1,000 would be paid to the plaintiff's personal representative in case of his death, or a proportionate part of the £1,000 to himself in case of injury resulting from railway accident while travelling. There was verdict for the plaintiff £34 19s. for medical attendance and expenses, and £100 for loss of time or loss of profits. A rule to enter a nonsuit was

¹ *Brown v. C. M. & St. P. Ry.*, 54 Wisc. 342, 3 Am. & Eng. R. R. Cas. 444; *C. H. & I. R. R. v. Eaton*, 94 Ind. 474, 18 Am. & Eng. R. R. Cas. 254; *L. E. & W. Ry. v. Fixe*, 88 Ind. 381, 11 Am. & Eng. R. R. Cas. 109; *Penna. Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. R. Cas. 436; *S. R. R. v. Kendrick*, 40 Miss. 374; *C. & I. C. R. R. v. Farrell*, 31 Ind. 408; *B. P. & C. Ry. v. Pixley*, 61 Ind. 22; *N. O., J. & G. N. R. R. v. Hurst*, 36 Miss. 660; *I. & G. N. R. R. v. Gilbert*, 64 Tex. 536, 22 Am. & Eng. R. R. Cas. 405; *I. & G. N. R. R. v. Terry*, 62 Tex. 380, 21 Am. & Eng. R. R. Cas. 323.

² *Le Blanche v. L. & N. W. Ry.*, 1 C. P. D. 286.

³ *Murdock v. B. & A. R. R.*, 133 Mass. 15, 6 Am. & Eng. R. R. Cas. 406.

⁴ 10 Ex. 45.

discharged, but a rule was made absolute to reduce the damages to £34 19s., it being held that damages for loss of profits are consequential, otherwise a passenger, whose time or business is more valuable than that of another, would, for precisely the same injury, receive greater remuneration than another.

II. DAMAGES FOR TORTS.

In actions sounding in tort, the plaintiff is entitled to recover a fair pecuniary compensation for the wrong done to him, the quantum of which compensation is to be determined by the jury in the exercise of a reasonable discretion, subject to review by the court, if that quantum is so disproportionately large or small as to show that the jury must necessarily have been influenced by improper motives, or must have proceeded upon a wrong principle.

389. There was formerly no certain rule as to the measure of damages in actions sounding in tort; thus, in *Ravenscroft v. Eyles*,¹ Wilmot, C. J., said, "in actions on the case, the damages are totally uncertain and at large." The modern theory is, that the damages should amount to a pecuniary compensation for the wrong done to the person injured.² It is the duty of the judge, at the trial, to specifically instruct the jury as to the measure of damages, and not to leave to them an arbitrary discretion in the ascertainment of the amount of the damages.³ The measure of damages is to be decided by the court, but the quantum of damages is to be fixed by the jury, subject to the review of the court

¹ 2 Wils. 295.

² *Bussy v. Donaldson*, 4 Dall. 206; *Walker v. Smith*, 1 Wash. C. C. 152; *Lockwood v. Allen*, 7 Mass. 254; *Dexter v. Spear*, 4 Mason 115; *St. L., I. M. & S. Ry. v. Cantrell*, 37 Ark. 519.

³ *P. R. R. v. Books*, 57 Penna. St. 339; *P. R. R. v. Zebe*, 33 Id. 318; *P. R. R. v. Vandever*, 36 Id. 298; *P. R. R. v. Butler*, 57 Id. 335; *Mansfield C. & C. Co. v. McEnery*, 8 Weekly Notes of Cases (Penna.) 81.

upon the principles hereinafter stated.¹ While the measure of damages is compensation for the pecuniary loss suffered by the party for whose benefit the action is brought, yet the jury should take a reasonable view, and should not give more than a fair compensation ;² thus, in *Armstrong v. S. E. Ry.*,³ Parke, J., directed the jury that "it would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. * * * You are not to consider the value of existence as if you were bargaining with an annuity office. * * * I advise you to take a reasonable view of the case, and give what you consider a fair compensation ;" and in *Rowley v. L. & W. Ry.*,⁴ Brett, J., reiterated these views, drawing attention to the point that the same rule as to the measure of damages must be applied in the cases of corporate and individual defendants, and that if juries do undertake to give "the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the action is brought, * * * poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now." Nevertheless, as Pollock, C. B., said, in *Wilson v. N. Dock Co.*,⁵ "cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. No precise positive rule can embrace all cases, and, notwithstanding any rule

¹ *Walker v. Smith*, 1 Wash. C. C. 152; *I. C. R. R. v. Barron*, 5 Wall. 90; *M. C. R. R. v. Caruth*, 51 Miss. 77; *Morris v. C., B. & Q. R. R.*, 45 Iowa 29; *K. P. Ry. v. Cutter*, 19 Kans. 83; *City of Delphi v. Lowery*, 74 Ind. 520; *O. & M. R. R. v. Collarn*, 73 Id. 261.

² *Armstrong v. S. E. Ry.*, 11 Jur. 758; *Rowley v. L. & W. Ry.*, 8 Ex. 221.

³ 11 Jur. 758.

⁴ 8 Ex. 221.

⁵ L. R. 1 Ex. 190.

of law that may be laid down, it must be admitted after all, that the question of the amount of damages is one for the jury, and the jury only, provided the law on the subject be properly laid down by the presiding judge, and then the amount of damages be left at large for the jury, we apprehend that a court would not interfere with their verdict because the jury had apparently come to some compromise among themselves, and had not strictly observed the supposed rule of law."

390. It is the duty of the court to grant a new trial where the damages, in the opinion of the court, are so grossly excessive, that the jury must, in awarding such an amount, have been influenced by improper motives, or have proceeded upon a wrong principle;¹ and it is also the duty of the court to grant a new trial where the damages are grossly inadequate;² and especially where the small amount of the damages, considered with reference to the testimony in the cause, shows that the jury have shrunk from deciding the issue submitted to them.³

391. As a general rule the quantum of the damages is not subject to review in an appellate court.⁴ The jury are not to be permitted to increase the damages by including interest from the time of the injury upon that sum which they determine to be the pecuniary

¹ *Creed v. Fisher*, 9 Ex. 472; *Lambkin v. S. E. Ry.*, 5 App. Cas. 352; *Coleman v. Southwick*, 9 Johns. 45; *B. P. & C. Ry. v. Pixley*, 61 Ind. 22; *O. & M. R. R. v. Collarn*, 73 Id. 261; *Fairman v. Lauman*, Id. 568; *Delphi v. Lowery*, 74 Id. 520; *Thurston v. Martin*, 1 Mason 197; *Knight v. P. S. & P. R. R.*, 57 Me. 202; *Gale v. N. Y. C. & H. R. R.*, 76 N. Y. 594; *M., K. & T. R. R. v. Weaver*, 16 Kans. 456; *Berry v. C. Ry.*, 40 Iowa 564; *Pry v. H. & St. J. R. R.*, 73 Mo. 123; *I. & G. N. R. R. v. Stewart*, 57 Tex. 166; *P., C. & St. L. R. R. v. Sponier*, 85 Ind. 165, 8 Am. & Eng. R. R. Cas. 453.

² *Phillips v. S. W. Ry.*, 4 Q. B. D. 406.

³ *Springett v. Ball*, 4 F. & F. 472.

⁴ *W. Ry. v. McDaniels*, 107 U. S. 454; *W., St. L. & P. Ry. v. Peyton*, 106 Ill. 524; *I. C. Ry. v. Frelka*, 110 Id. 498; *Pabst v. B. & O. R. R.*, 2 MacArthur (D. C.) 42.

compensation due by the defendant to the plaintiff;¹ nor are the jury to be permitted to include the plaintiff's counsel fees in the damages awarded to him.

III. EXEMPLARY DAMAGES.

Exemplary or punitive damages can be recovered where the wrong has been done under circumstances of wanton violence and oppression on the part of the railway, as evidenced by the character of the act, and by the fact that the particular act has been done under an antecedent authorization, or has been subsequently ratified, either expressly, or impliedly by the retention in the service of the servant whose wrongdoing has caused the injury.

392. Where the wrong has been done under circumstances indicating wantonness, violence, and oppression upon the part of the wrongdoer, exemplary damages are recoverable;² but such damages are not recoverable against a railway unless the injury is the result of the authorized or ratified misconduct of the servants of the railway.³ There are some cases which hold that where a person is injured by gross negligence on the part of the railway, he may recover exemplary damages;⁴ but

¹ Mowry *v.* Whitney, 14 Wall. 434; Weir *v.* Alleghany, 95 Penna. St. 413; P. S. Ry. *v.* Taylor, 104 Id. 306; C. R. R. *v.* Sears, 65 Ga. 409.

² Bell *v.* Midland Ry., 10 C. B. N. S. 287, 100 E. C. L.; Emblen *v.* Myers, 6 H. & N. 54; Tracy *v.* Swartwout, 10 Pet. 81; P. R. R. *v.* Kelley, 31 Penna. St. 372; P. R. R. *v.* Books, 57 Id. 339.

³ M. & St. P. Ry. *v.* Arns, 91 U. S. 489; Day *v.* Woodworth, 13 How. 371; P. W. & B. R. R. *v.* Quigley, 21 Id. 213; W. U. T. Co. *v.* Eyster, 91 U. S. 495, note; N. O., J. & G. N. R. R. *v.* Hurst, 36 Miss. 660; B. & O. R. R. *v.* Blocher, 27 Md. 277; Goddard *v.* G. T. Ry., 59 Me. 202; C. S. Ry. *v.* Steen, 42 Ark. 321, 19 Am. & Eng. R. R. Cas. 30; I. & St. L. R. R. *v.* Cobb, 68 Ill. 53; Doss *v.* M. K. & T. R. R., 59 Mo. 27, 8 Am. Ry. Rep. 462; K. P. Ry. *v.* Lundin, 3 Colo. 94; L. N. & G. S. R. R. *v.* Guinan, 11 Lea (Tenn.) 98; S. R. R. *v.* Kendrick, 40 Miss. 371; Ackerson *v.* E. R. R., 3 Vroom 254; Porter *v.* Same, Id. 261; C. St. L. & N. O. R. R. *v.* Scurr, 59 Miss. 456, 6 Am. & Eng. R. R. Cas. 341; P., F. W. & C. R. R. *v.* Slusser, 19 Ohio St. 157; Hamilton *v.* Third Ave. R. R., 53 N. Y. 25.

⁴ Hopkins *v.* A. & St. L. R. R., 36 N. H. 9; A. & G. W. Ry. *v.* Dunn, 19 Ohio St. 162; M. & M. R. R. *v.* Ashcroft, 48 Ala. 15; Varillat *v.* N. O. & C.

considering the want of any intelligible distinction between negligence and gross negligence, and bearing in mind the principles hereinbefore stated, which determine the responsibility of railways for the acts of their servants, the better doctrine is that a railway is not to be held liable in exemplary damages for injuries caused by the negligence of its servant, unless it be shown that the servant's act was wilful in its character, and was either authorized or ratified by the railway, nevertheless conceding that such authorization or ratification can be evidenced either by an expressed order to do the act, or an expressed approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant.¹

IV. THE MEASURE OF DAMAGES IN CASES OF INJURIES NOT CAUSING DEATH.

The measure of damages in case of injuries not causing death is, in general, compensation for bodily and mental pain and suffering, present and future, and for loss of earnings since the injury and for loss of future earning power, and reimbursement of actual expenditure, or legal liability incurred, for medical treatment and nursing.

393. Actions sounding in *tort* for injuries to the person being founded, not upon the damage only, but upon the unlawful act and the consequent damage, the plaintiff cannot bring more than one action therefor against the same defendant, and therein he may recover both

R. R., 10 La. An. 88; K. C. R. R. v. Dills, 4 Bush (Ky.) 593; Taylor v. G. T. Ry., 48 N. H. 305; L. & N. R. R. v. McCoy, 81 Ky. 403, 15 Am. & Eng. R. R. Cas. 277; C. St. R. R. v. Steen, 42 Ark. 321, 19 Am. & Eng. R. R. Cas. 30.

¹ Cleghorn v. N. Y. C. & H. R. R. R., 56 N. Y. 44; Hagan v. P. & W. R. R., 3 R. I. 88.

present and prospective damages.¹ Upon this principle the plaintiff may recover for future physical suffering and loss of earning power where the apprehended consequences are such as in the ordinary course of nature are reasonably certain to ensue, but there can be no recovery in damages for merely possible consequences.² The mental suffering for which the plaintiff can recover is that which is connected with and follows the injury;³ and the plaintiff may recover for any injury to health resulting from exposure after the accident;⁴ and in proof of his loss of earnings since the injury, the plaintiff may show that he was engaged in a particular business, and that the necessary effect of his injury was to disable him from attending to his business, and thereby cause a pecuniary loss to him;⁵ but if the business conducted by the person injured be prohibited by law, he cannot recover for his inability to continue it.⁶

394. It is in general held that the damages recoverable include compensation for bodily and mental pain and suffering, present and future; reimbursement of actual expenditure for, or legal liability incurred for, medical treatment and nursing; and compensation for loss of earnings since the injury, and for loss of future earning power.⁷

¹ *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L.

² *Strohm v. N. Y., L. E. & W. R. R.*, 96 N. Y. 305; *Delie v. C. & N. W. Ry.*, 51 Wisc. 400; *Curtis v. R. & S. R. R.*, 18 N. Y. 534; *Filer v. N. Y. C. R. R.*, 49 Id. 45; *Fry v. D. & S. W. Ry.*, 45 Iowa 416; *B. S. R. R. v. Harris*, 67 Ala. 6.

³ *I. & St. L. R. R. v. Stables*, 62 Ill. 313; *Porter v. H. & St. J. R. R.*, 71 Mo. 66, 2 Am. & Eng. R. R. Cas. 44.

⁴ *Ehrgott v. The Mayor*, 96 N. Y. 264.

⁵ *Wade v. Leroy*, 20 How. 34; *Nebraska City v. Canipbell*, 2 Black (S. C.) 590.

⁶ *Jacques v. B. H. R. R.*, 41 Conn. 61.

⁷ *Phillips v. S. W. Ry.*, 4 Q. B. D. 406, 5 Id. 85, 5 C. P. D. 280; *Laing v. Colder*, 8 Penna. St. 479; *P. R. R. v. Allen*, 53 Id. 276; *P. R. R. v. Books*, 57 Id. 339; *P. & O. Canal Co. v. Graham*, 63 Id. 290; *I. C. R. R. v. Barron*, 5

395. The damages awarded to the injured plaintiff are not to be diminished by his receipts from an accidental insurance policy, because the insurer's contract of indemnity, and not the contingency of the accident, is the cause of his receiving the avails of the policy;¹ nor are the damages to be diminished by the injured person's continued receipt of full wages from his employer during the period of his incapacity to labour.²

396. There is a recent English case which illustrates the rule of law as to damages for personal injuries, and which is worthy of careful consideration. In *Phillips v. S. W. Ry.*,³ the plaintiff was an eminent London physician of middle age and of robust health, making from the practice of his profession an average income of £5,000. Having been injured in a railway accident, he underwent a great amount of pain and suffering; at the time of the first trial, sixteen months after the accident, his condition was apparently helpless and hopeless, and he had then incurred expenses for medical treatment amounting to £1,000. Field, J., in substance directed the jury not to attempt to give an exact equivalent for the injury sustained, but to bring their reasonable common sense to bear, and to consider that while the plaintiff might die at any time, and while many things might happen to prevent his continuing in prac-

Wall. 90; *Ransom v. N. Y. & E. R. R.*, 15 N. Y. 415; *Curtis v. R. & S. R. R.*, 18 Id. 534; *S. & N. A. R. R. v. McLendon*, 63 Ala. 266; *Whalen v. St. L., K. C. & N. Ry.*, 60 Mo. 323; *O. & M. Ry. v. Dickerson*, 59 Ind. 317; *P. C. & St. L. Ry. v. Sponier*, 85 Id. 165, 8 Am. & Eng. R. R. Cas. 453; *Porter v. H. & St. J. R. R.*, 71 Mo. 66, 2 Am. & Eng. R. R. Cas. 44; *Totten v. P. R. R.*, 11 Fed. Rep. 564; *St. L., I. M. & S. Ry. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. R. Cas. 198; *Klutts v. St. L., I. M. & S. Ry.*, 75 Mo. 642, 11 Am. & Eng. R. R. Cas. 639; *Davis v. C. R. R.*, 60 Ga. 329; *W. & A. R. R. v. Drysdale*, 51 Id. 644; *P. R. R. v. Spieker*, 105 Penna. St. 142; *Geveke v. G. R. & I. Ry.*, Mich. , 22 Am. & Eng. R. R. Cas. 551.

¹ *Bradburn v. G. W. Ry.*, L. R. 10 Ex. 1; *B. & O. R. R. v. Wightman*, 29 Grat. 431.

² *O & M. Ry. v. Dickerson*, 59 Ind. 317.

³ 4 Q. B. D. 406.

tice, yet, on the other hand, he might continue to live for many years, and that they must give him fair compensation for the pain, inconvenience, loss of enjoyment, loss of income up to the time of the trial and prospective loss of income in the future. The jury having found for the plaintiff in £7,000, the plaintiff moved for a new trial for insufficiency of damages and also on the ground of misdirection as having led to an insufficient assessment of damages. In the Court of Queen's Bench it was held, Cockburn, C. J., delivering judgment, that Field, J., had correctly directed the jury, but the rule for a new trial was made absolute upon the other ground, the Lord Chief Justice, after referring to the rule laid down by Brett, J., in *Rowley v. L. & N. W. Ry.*,¹ saying: "we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which the plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent, the expenses incidental to attempts to effect a cure or to lessen the amount of injury, the pecuniary loss sustained through inability to attend to a profession or business as to which again the amount of injury may be of a temporary character or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb their verdict."

¹ L. R. 8 Ex. 221.

He distinguished the cases of *Randall v. Hayward*,¹ and *Forsdike v. Stone*,² upon the ground that they were actions for slander in which the jury may consider, not only what the plaintiff ought to receive, but also what the defendant ought to pay, and he added: "we think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where, in such an action, the damages are excessive. There can be no reason why the same principle should not be applied where they are insufficient to meet the justice of the case." The defendant having appealed, the judgment of the Court of Appeal affirming the Queen's Bench Division was delivered by James, L. J.³ The Lord Justice said: "we agree that judges have no right to overrule a verdict of the jury as to the amount of damages merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject to the supervision of a court of first instance, and, if necessary, of a court of appeal in this way; that is to say, if, in the judgment of the court, the damages are unreasonably large, or unreasonably small, then the court is bound to send the matter for reconsideration by another jury." The direction of Field, J., was substantially approved. The case was tried a second time before Coleridge, L. C. J.,⁴ who instructed the jury, that while it was fair and reasonable that the defendant should pay to the plaintiff, by way of compensation for the injury which he

¹ 5 Bing. N. C. 424.

² 5 Q. B. D. 85.

³ L. R. 3 C. P. 607.

⁴ 5 C. P. D. 280.

had sustained, the amount of compensation for it was to be such as the jury might think would be fair and reasonable, and that there must be taken into account as elements of compensation the bodily pain and suffering which the plaintiff had endured, the loss of his professional income from the time of the accident to the time of the trial, and the loss of future income, basing the estimate upon the proved net professional income of the plaintiff, but remembering that that amount included certain large presents or special fees. It had been proven that the plaintiff, at the time of the accident, was in the receipt of a private income irrespective of his professional earnings amounting to between £3,000 and £4,000 a year, and in his summing up the Lord Chief Justice omitted to refer to that source of income. The jury found a verdict of £16,000 for the plaintiff, and the defendant having moved for a new trial, on the ground of misdirection, the Common Pleas Division refused the rule, Grove, J., saying: "the plaintiff is entitled to receive at the hands of the jury compensation for the pain and bodily suffering which he has undergone, for the expense which he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to." The defendant then took the case to the Court of Appeal, which sustained the court below in its refusal of a new trial, Bramwell, L. J., saying: "I have tried, as judge, more than a hundred actions of this kind, and the direction which I, in common with other judges, have been accustomed to give the jury has been to the following effect: 'You must give the plaintiff a compensation for his pecuniary loss; you must give him a compensation for his pain and bodily suffering; of

course it is almost impossible for you to give to an injured man what can be strictly called a compensation, but you must take a reasonable view of the case and must consider under all the circumstances what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned. * * * It is argued that it has an unjust operation for the following reason: two passengers are carried upon the same journey for the same fare. If one of them is injured he will obtain £10,000 damages against the company, whereas if the other meets with an accident he will obtain only £1,000. This result may be unreasonable as regards the passengers *inter se*, but it is not unreasonable as between the company and the public. The company have taken their powers upon certain conditions, and one of them is that if they break their contracts to carry safely and securely, (which may happen without any moral blame attaching to them), they shall make adequate compensation to the person injured. It may be that the passenger who recovers £10,000 has paid too little for his ticket, and that the passenger who recovers £1,000 has paid too much; nevertheless together they have paid what is a compensation to the company for the risk which they undertake." Brett, L.J., said: "the action is for breach of a contract to carry a passenger safely and securely, and the only damages which can be obtained are damages for the breach of that contract. The fundamental proposition, no doubt, is that the plaintiff is to receive such damages as will compensate him for the injury ensuing from the breach of the contract. That injury is of a complicated nature, the plaintiff has received a bodily hurt and he has also sustained a pecuniary loss." * * * Lord Coleridge "in effect told the jury that the compensation was to be such as they might think fair and reasonable, but that they

must not attempt to give an absolutely perfect compensation with respect to the pecuniary loss. I apprehend that both these propositions are correct, and that the reason why this general mode of leaving the question to the jury is right is that human ingenuity has not been able to devise a more correct proposition, and that if the judge tries to make a perfect proposition he either states something which is wrong, or omits to state something which ought to be stated." The Lord Justice then referred to *Rowley v. L. & N. W. Ry.*,¹ and added: "it has been long recognized as a proper mode of summing up to tell the jury to give such compensation as under all the circumstances they may think fair and reasonable, and at the same time, in order to assist them, to point out some circumstances which they ought to consider. When the jury have to give compensation for the loss of a professional or trading income, the chief points to be considered are the amount of that income and of what it is made up. It has been in effect suggested by the counsel for the defendants that the amount of the income at the time of the accident ought not to be taken into account. This suggestion seems to me to be erroneous. * * * If no accident had happened, nevertheless many circumstances might have happened to prevent the plaintiff from earning his professional income. He may be disabled by illness; he is subject to the ordinary accidents and vicissitudes of life, and if all those circumstances of which no evidence can be given are looked at it would be impossible to exactly estimate them. Yet if the jury wholly pass over them they will go wrong, because those accidents and vicissitudes ought to be taken into account. It is true that the chances of life cannot be accurately calculated, but the judge must tell the jury to consider them in order that they

¹ L. R. 8 Ex. 221.

may give a fair and reasonable compensation. In my opinion it would be right that a jury should give the same amount to a workingman and to a person of great wealth for personal injury, if that is the same, and if the accompanying suffering is the same, and that each should receive the expenses which he has properly incurred, but that in estimating the pecuniary loss each should receive as nearly as possible only the amount of the loss which he has actually sustained." Cotton, L.J., concurred. As to the condition of the plaintiff's health at the time of the second trial and the prospect of his ultimate recovery the case as reported is ambiguous. Lord Coleridge referred in his direction to the jury to the "probability that for a year and a half or two years more the plaintiff would be debarred from following his profession." Grove, J., in refusing the rule for a new trial, said: "the injury which he has sustained will, in all human probability, deprive him of the power of ever resuming his practice."

The person injured is bound to exercise for his cure and treatment the care of a prudent man.

397. The party injured is bound to take such care of himself after the accident as a prudent man would take under the circumstances, but he is not bound to employ a surgeon of the highest skill, nor is he an insurer of the success of the medical treatment;¹ yet where the person injured had disregarded the advice of his medical attendants to abstain from business for two years, and had, because of such disobedience, become permanently incapacitated from doing business, whereas,

¹ Klutts *v.* St. L., I. M. & S. Ry., 75 Mo. 642, 11 Am. & Eng. R. R. Cas. 639; Nagel *v.* M. P. Ry., Id. 653, 10 Am. & Eng. R. R. Cas. 702; Sauter *v.* N. Y. C. & H. R. R. R., 66 N. Y. 50; Lyons *v.* E. Ry., 57 Id. 489; P. P. C. Co. *v.* Bluhm, 109 Ill. 20, 18 Am. & Eng. R. R. Cas. 87; Allender *v.* C. R. I. & P. R. R., 37 Iowa 264.

if he had rested, he would probably have regained his health, the Common Pleas refused to disturb a verdict in his favour for compensatory damages.¹

The measure of damages in a husband's suit for injuries to his wife is compensation for the loss of his wife's society and services, and reimbursement for the necessary expenses of her medical treatment.

398. Where a husband sues for injuries to the person of his wife, he is entitled to recover for the loss of his wife's society and services and for the necessary expenses of her medical treatment.² Where the suit is brought on the wife's behalf to recover for her personal injuries, there can be no recovery for any loss which the husband may have sustained, and for which he alone could bring suit, such as a diminution of the wife's earning power, or the expenses of her medical treatment, but the recovery can only be for the physical injury done to the wife.³

The measure of damages in a parent's or master's suit for injuries to his child or servant is compensation for loss of service during the minority of the child or the period of service, and reimbursement for the necessary expenses of medical treatment.

399. Where a parent or master sues for injuries done to the person of a child or servant, the plaintiff can only recover for the loss of service during the period of service, or during the minority of the child, and for

¹ Saunders *v.* L. & N. W. Ry., 8 C. B. N. S. 887, 98 E. C. L.

² King *v.* Thompson, 87 Penna. St. 365; P. R. R. v. Goodman, 62 Id. 329; Pack *v.* The Mayor, 3 Comst. 489; Neir *v.* W. P. Ry., 12 Mo. App. 35; Cregin *v.* B. C. R. R., 83 N. Y. 595.

³ Dengate *v.* Gardiner, 4 M. & W. 6; King *v.* Thompson, 87 Penna. St. 365; B. C. P. Ry. *v.* Kemp, 61 Md. 74; Fuller *v.* N. R. R., 21 Conn. 557; N. C. Ry. *v.* Mills, 61 Md. 355, 19 Am. & Eng. R. R. Cas. 160; Klein *v.* Jewett, 26 N. J. Eq. 474; Tuttle *v.* C., R. I. & P. Ry., 42 Iowa 518.

actual expenditure and legal liability incurred for the medical treatment and care of the child or servant.¹

V. THE MEASURE OF DAMAGES IN CASES OF INJURIES CAUSING DEATH.

In actions to recover damages for injuries causing death, if the statute authorizing the action does not prescribe any other measure of damages, the damages are in general to be assessed on the basis of the pecuniary loss caused by the death to the persons for whose benefit the action is brought.

400. In actions to recover for death the terms of the statute authorizing the action are in general decisive of the right to sue and the measure of damages. In case of death or personal injury, resulting from negligence on the part of the railway, where the parties for whose benefit the action is brought fail to show any pecuniary injury to themselves, nominal damages are recoverable.² Of course, any pecuniary loss to the person for whose benefit the action is brought and directly resulting from the death should be taken into consideration by the jury; thus, in *Pym v. G. N. Ry.*,³ the plaintiff sued as the widow and administratrix of her husband, who had never been in any profession or business and was of independent property. The deceased by will had so settled his property, which produced an income of £4,000 annually, that in case of his death £800 was to be annually paid to his younger children, and the rest to the eldest son, charged with

¹ *P. R. R. v. Kelly*, 31 Penna. St. 372; *Frick v. St. L., K. C. & N. R. R.*, 75 Mo. 542; *Smith v. St. J. & H. R. R.*, 55 Mo. 556; *St. L., I. M. & S. Ry. v. Freeman*, 36 Ark. 41.

² *A. T. & S. F. R. R. v. Weber*, 33 Kans. 543, 21 Am. & Eng. R. R. Cas. 418; *Ihl v. 42d St. R. R.*, 47 N. Y. 317; *C. & A. R. R. v. Shannon*, 43 Ill. 338; *C. & N. W. R. R. v. Swett*, 45 Id. 197; *Chicago v. Schollen*, 75 Id. 468.

³ 2 B. & S. 750, 110 E. C. L.; 4 B. & S. 396, 116 E. C. L.

the payment of the £800 and of a jointure to the widow of £1,000. At the trial, Cockburn, C. J., directed the jury: "if, after making allowance for what the deceased would naturally have expended on himself, they thought that a portion of his income beyond the £1,800 a year, to which his widow and eight younger children became entitled at his death, would have been from time to time set aside by him for the benefit of his family, or appropriated to their education and advancement in life, and would thus have secured to them advantages, which by his death they had lost, that would constitute such pecuniary loss and damage as would enable them to find a verdict for the plaintiff." The jury found for the plaintiff in £13,000, £1,000 for the widow and £1,500 for each of the younger children. The defendant having obtained a rule in pursuance of leave reserved to enter a verdict for the defendant, or a nonsuit on the ground that the evidence established no cause of action, or for a new trial because of excessive damages, the rule on the former ground was discharged, and on the latter ground the verdict having, by consent of the plaintiff, been reduced to £9,000, that rule was also discharged. The defendant having appealed to the Court of Exchequer Chamber, the judgment of the Queen's Bench was affirmed, it being held that an action under the statute is maintainable where the decedent could have maintained no action if he had survived the injury, the condition in the statute having reference not to the nature of the loss or the injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of; and that while the damages must be based on a pecuniary loss, the extinction of a reasonable expectation of pecuniary advantage from the continuance of the life of the decedent

is a sufficient cause of action, and that the statute giving a remedy to individuals, not to a class, although the death of the decedent caused no loss of property to his family, yet as that death changed the mode of distribution of the income of that property, those whose reasonable expectations of pecuniary advantage were disappointed by that death were entitled to be compensated. So, in *Rowley v. L. & N. W. Ry.*,¹ the plaintiff sued as executrix of an attorney who had covenanted to pay his mother £200 annually during his and her joint lives. No question was raised as to the damages recoverable for the widow and the children. At the time of the decedent's death he was forty years of age, and his mother sixty-one years of age. An accountant having testified from the Carlisle tables as to the probable duration of the son's and mother's lives, and as to the cost to the mother of an annuity secured by the government of £200 for her life, Kelly, C. B., instructed the jury that they might, if they thought proper, calculate the damages which the mother was entitled to recover by ascertaining what sum of money would purchase an annuity of £200 for a person sixty-one years of age, according to the average duration of human life. The jury found a verdict for the plaintiff for £6,200, apportioning to the mother £1,200, and the balance to the widow and children. The case having been carried to the Court of Exchequer Chamber by bill of exceptions, a *venire de novo* was granted on the ground of misdirection, inasmuch as that which the mother lost by her son's death was an annuity, not for her life, but for the joint lives of her son and herself, which was of obviously less value than an annuity for her life only, and the annuity was secured only by

¹ L. R. 8 Ex. 221.

the personal covenant of the deceased, whereas the testimony referred to a government annuity. Brett, J., in delivering judgment, said: "it seems to me that the Lord Chief Baron did leave it open to the jury to suppose, that they might properly assess as the proper damages a sum of money which would be the present price or value of an annuity which would give to the mother an annual income equal to that she would have received from her son for the probable duration of time during which the covenanted annuity would have been paid to her if her son had not been killed. That is, in other words, to hold that the damages in such case may be the 'fully calculated equivalent of the pecuniary loss suffered by the person on whose behalf the action is brought.' If juries do give such damages, poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now." And after referring to *Blake v. Midland Ry.*, and to *Armsworth v. S. E. Ry.*, he quoted the usual direction, and added: "I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust. Founding my opinion on that conviction, on the declaration of it by Parke, J., and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction that I have enunciated is the legal and the only legal direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they may think an equivalent,

and for the pecuniary mischief done, and such a direction is a misdirection according to law."

401. Therefore, as a general rule, the damages must be so limited as to give not more than a compensation for the pecuniary loss suffered by the plaintiff, or by the persons for whose benefit the action is brought.¹ The term "pecuniary loss" is not to be found in Lord Campbell's Act, nor in some of the statutes *in pari materia* which have been enacted in the several States of the United States, but that term has been judicially adopted, not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative, upon which, in the nature of things, it is not possible to set a pecuniary valuation. In *Lett v. St. L. & O. Ry.*,² Galt, J., in a very few words clearly shows that the term "material," rather than "pecuniary," expresses with accuracy the exact nature of that loss which can be compensated under Lord Campbell's Act and the statutes which have followed it.

In the term "pecuniary loss" there is included the loss to the person for whose benefit the action is brought, of a reasonable expectation of a pecuniary gain from the continuance of the life of the person killed.

402. It is well settled that the term "pecunary loss" includes, not only the loss of any money which the

¹ *Blake v. M. Ry.*, 18 Q. B. 93, 83 E. C. L.; *Duckworth v. Johnson*, 4 H. & N. 653; *Galliard v. L. & Y. Ry.*, 12 L. T. 356; *Bramall v. Lees*, 29 Id. 82; *N. P. R. R. v. Robinson*, 44 Penna. St. 175; *L. C. & L. R. R. v. Case*, 9 Bush (Ky.) 728; *I. & G. N. R. R. v. Kindred*, 57 Tex. 491, 11 Am. & Eng. R. R. Cas. 649; *Lett v. St. L. & O. Ry.*, 11 Ont. Ap. 1, 21 Am. & Eng. R. R. Cas. 165; *I. C. R. R. v. Weldon*, 52 Ill. 290; *Needham v. G. T. R. R.*, 38 Vt. 294.

² 11 Ont. Ap. 1, 21 Am. & Eng. R. R. Cas. 165.

deceased was under a legal liability to pay to the person or persons for whose benefit the action has been brought, but also the loss of a reasonable expectation upon the part of those persons of a pecuniary benefit to them from the continuance of the life of the deceased.

403. This reasonable latitude of construction has been applied in the cases where a parent sues for the death of a child ; thus, in *Franklin v. S. E. Ry.*,¹ the plaintiff sued as administrator to recover for the death of his son twenty-one years of age, who had been in the habit of assisting the plaintiff in certain work, for which the plaintiff received three shillings and six pence weekly. Bramwell, B., left it to the jury to say whether the plaintiff had a reasonable expectation of any, and what, pecuniary benefit, if any, from the continuance of his son's life, and this direction was approved by the court *in banc*, Pollock, C. B., saying : "it is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss, and accordingly the rule has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damages ascertained thereby. * * * Nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit from the continuance of his son's life, and, if so, to what extent were the questions left, in this case, to the jury. * * * We do not say that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation may exist, though from the father not being in need the son had never done anything for him. On the other hand, a jury certainly

¹ 3 H. & N. 211.

ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit which may have been reasonably expected from the continuance of the life. We think, therefore, the action maintainable." So, in *Dalton v. S. E. Ry.*,¹ the plaintiffs, a father and a mother, sued for the death of their son, twenty-seven years of age, unmarried, but not living at home, earning about £3 weekly, and accustomed to visit his parents at short intervals, and to make them presents averaging about £20 a year. Byles, J., directed the jury that the plaintiffs were entitled to recover under the statute, and suggested that the jury should find specially the sums to which the plaintiffs were entitled for their pecuniary loss, and for the decedent's funeral expenses and the plaintiff's mourning clothes. The jury having found a verdict as to the pecuniary loss of £120, and as to the mourning and funeral expenses £25, a rule for a new trial was discharged as to the £120, and made absolute as to the £25, Willes, J., saying, "the reasonable expectation of pecuniary advantage of the relations remaining alive may be taken into account by the jury, and damages may be given in respect to the expectation being disappointed, and the probable pecuniary loss thereby occasioned." So, in *Duckworth v. Johnson*,² the plaintiff sued for the death of his son, fourteen years of age, who had earned 4s. a week for a year or two, which had gone into the common family stock, but who, at the time of his death, was out of employment, and it was held, that while no action under the statute can be maintained unless the plaintiff proves actual damage, that here there was sufficient actual damage in the loss to the father of the gain which he reasonably might anticipate for his boy's future

¹ 4 C. B. N. S. 296, 93 E. C. L.

² 4 H. & N. 653

labour. So, in *Bramall v. Lees*,¹ a father having, at the trial before Crompton, J., recovered a verdict of £15 for the death of a daughter twelve years of age, who had never earned any money, but who might, if she had lived, have obtained wage-earning work in a factory, a rule for a new trial was granted upon a motion on behalf of the defendant, but was not pressed to argument, and in the later case of *Chapman v. Bothwell*,² Crompton, J., referring to *Bramall v. Lees*, said that the court were of opinion that the rule in that case ought not to be granted, and that they only granted it because of a doubt which he entertained, but that at the end of the discussion he was satisfied that his doubt was not well grounded.³

404. The cases in the United States generally hold, following in the line of *Bramall v. Lees*, that it is not necessary for a parent, in order to establish a reasonable probability of gain from the continued life of a minor child, to show that the child ever has earned anything, but that the value of the child's probable future services is a matter of conjecture, and may be determined by the jury without the testimony of witnesses as to the value of such services.⁴ Of course, the jury in estimating the pecuniary loss to the parents of a minor child, must take into consideration the fact that the parents, if they may reasonably anticipate a gain from the child's labour, must also defray the

¹ 29 L. T. 111.

² 4 Jur. N. S. 1181.

³ See, also, *Hetherington v. N. E. Ry.*, 9 Q. B. D. 160; *Condon v. G. S. & W. Ry.*, 16 Irish C. L. 415; cf. *Boulter v. Webster*, 13 W. R. 289; *Sykes v. N. E. Ry.*, 32 L. T. N. S. 199.

⁴ *Oldfield v. N. Y. & H. R. R.*, 3 E. D. Smith 103, 14 N. Y. 310; *Drew v. Sixth Ave. R. R.*, 26 Id. 49; *Ihl v. 42d St. R. R.*, 47 Id. 317; *Chicago v. Major*, 18 Ill. 349; *Chicago v. Scholton*, 75 Id. 469; *L. R. & F. S. Ry. v. Barker*, 39 Ark. 491, 19 Am. & Eng. R. R. Cas. 195; *Potter v. C. & N. W. Ry.*, 22 Wise. 615; *Seaman v. F. L. & T. Co.*, 15 Id. 578.

necessary cost of the child's maintenance.¹ Where the child is of age at the time of his or her death, or if under age, has not been living under the parental roof, the burden is on the plaintiff of proving a reasonable expectation of his receiving a pecuniary benefit from the continued life of the child;² but where the child lives under the parental roof, and is under age at the time of his death, there is a presumption of pecuniary loss to his parents resulting from his death.

405. Where a husband sues for his wife's death, or where children sue for their mother's death, the husband and children are entitled to recover, not only for any pecuniary loss directly resulting from the death of the wife and mother, as, for instance, where she is in receipt of an annuity which has been appropriated to the payment of family expenses, and which terminates with her death, but also for the material loss resulting from the deprivation of her services to her family.³ This question is fully considered in the case of *Lett v. St. L. & O. Ry.*,⁴ where all the English authorities were reviewed, especially in the learned and elaborate judgment of Patterson, J., and the conclusion reached that the death of a wife and mother is such a material loss as entitled the husband and the children living at home to a substantial recovery in damages. In *B. & O. R. R. v. State to use of Mahone*,⁵ where adult chil-

¹ *The Penna. Co. v. Lilly*, 73 Ind. 252; *R., R. I. & St. L. Ry. v. Delaney*, 82 Ill. 198.

² *P. R. R. v. Adams*, 55 Penna. St. 499; *N. P. R. R. v. Kirk*, 90 Id. 15; *P. R. R. v. Kellar*, 67 Id. 300.

³ *Chant v. S. E. Ry.*, Weekly Notes (English) for 1866, p. 134; *Wilkins v. Day*, 12 Q. B. D. 110; *Lett v. St. L. & O. Ry.*, 11 Ont. Ap. 1, 21 Am. & Eng. R. R. Cas. 165; *P. R. R. v. Goodman*, 62 Penna. St. 329; *McIntyre v. N. Y. R. R.*, 37 N. Y. 287; *Woodward v. C. & N. W. Ry.*, 23 Wisc. 400; cf. *Dickins v. N. Y. C. R. R.*, 23 N. Y. 158.

⁴ 11 Ont. Ap. 1, 21 Am. & Eng. R. R. Cas. 165.

⁵ 63 Md. 135, 21 Am. & Eng. R. R. Cas. 202.

dren sued for damages for the death of their mother, it was held that the plaintiffs could only recover for the loss of a reasonable expectation of pecuniary benefit from the continuance of her life, and that those of the children who lived apart from her, and who derived no pecuniary benefit from her, could not be compensated in damages, while, on the other hand, a married daughter, with whom she lived, and in whose household she performed domestic services, was entitled to be compensated for her death.

406. Where a widow, or children, sue for the death of their husband, or father, they can recover for the loss of any reasonable expectation of pecuniary benefit from the death of the husband or father.¹ Obviously the loss suffered by the widow, or children, in the death of the husband, or father, is that amount which the deceased would probably have earned by his intellectual, or bodily labour, in his profession, or business, during the residue of his life, and which would have gone for the benefit of his children, or widow, taking into consideration his age, ability, and disposition to labour, and his habits of living and expenditure.² Where a widow sues for damages for the death of her husband, her recovery is not barred by the fact that at the time of his death she was, by agreement, separated from him.³

407. Where the statute which creates the right of recovery permits the suit to be brought for the benefit of the next of kin (other than parents, husband, wife, or children), they can recover damages based upon an

¹ *Armsworth v. S. E. Ry.*, 11 Jur. 758; *Gillard v. L. & Y. Ry.*, 12 L. T. 356; *Blake v. M. C. Ry.*, 18 Q. B. 93, 83 E. C. L.; *P. R. R. v. Vandiver*, 36 Penna. St. 298; *P. R. R. v. Henderson*, 51 Id. 315; *C. R. R. v. Armstrong*, 52 Id. 282; *H. & B. T. R. R. v. Decker*, 84 Id. 419.

² *P. R. R. v. Butler*, 59 Penna. St. 335; *B. & O. R. R. v. Weightman*, 29 Gratt. 431; *C. R. R. v. Roach*, 64 Ga. 635, 8 Am. & Eng. R. R. Cas. 79; *B. & O. Ry. v. State*, 41 Md. 268.

³ *D. & W. R. R. v. Spicker*, 61 Tex. 427, 21 Am. & Eng. R. R. Cas. 100.

estimate of their reasonable expectation of pecuniary benefit from the continuance of the life of the deceased.¹

408. Where personal representatives sue for the benefit of the decedent's estate, they can recover for what would be the probable amount of the accumulations of their decedent during what would probably have been his lifetime.²

409. A bastard is not a child within the meaning of the statutes authorizing a recovery of damages in case of death.³

410. The ground of a recovery of damages in an action for the death of any one, being the pecuniary loss to those for whose benefit the action is instituted, it is obvious that the personal sufferings of the deceased are not an element of damage;⁴ nor can the plaintiff's disbursements, or legal liability, incurred for the nursing of, and medical attendance upon, the deceased be taken into consideration in estimating the plaintiff's damages, for the cause of injury was the death.⁵

411. It is clearly settled that no damages can be recovered by way of compensation for any merely sentimental loss, or by way of *solatium* for the sorrow and grief which the death has caused to the surviving members of the family of the deceased; thus, in *Blake v. Midland Ry.*,⁶ the plaintiff having brought suit under the statute as administratrix of her husband, Park, B., directed the jury that beyond the pecuniary injury they might give her compensation for the bereavement she had

¹ *Scheffler v. M. & St. L. Ry.*, 32 Minn. 125, 19 Am. & Eng. R. R. Cas. 173.

² *P. R. R. v. McCloskey*, 23 Penna. St. 526.

³ *Dickinson v. N. E. Ry.*, 2 H. & C. 735; *Gibson v. M. Ry.*, 2 Ont. (Can.) 658.

⁴ *P. R. R. v. Zebe*, 33 Penna. St. 318; *Durkee v. C. P. R. R.*, 56 Cal. 388; *contra.*, *N. & C. R. R. v. Stevens*, 9 Heisk. (Tenn.) 12.

⁵ *P. R. R. v. Zebe*, 33 Penna. St. 318; *P. R. R. v. Bantom*, 54 Id. 495; *C. & P. R. R. v. Rowan*, 66 Id. 393.

⁶ 18 Q. B. 23, 83 E. C. L.

sustained, but a rule for a new trial upon the ground of misdirection was made absolute, the court holding that the statute gives compensation only for the pecuniary loss;¹ nor are the mental sufferings of those for whose benefit the action is brought, elements of damage.²

The damages in England do not include funeral expenses, etc., but in the United States disbursements for that purpose are generally permitted to be included.

412. It is settled in England, that the funeral expenses of the deceased, and the cost of the mourning dress provided for those for whose benefit the action is brought, are not elements of damage. The ground of that conclusion is thus stated by Willes, J., in *Dalton v. S. E. Ry.*:³ "the subject-matter of the statute is compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss." The same view is taken in *Boulter v. Webster*.⁴ On the other hand, in the American courts, it is universally held that funeral expenses are, in such cases, recoverable as damages.⁵ I am not aware of any American case in which the question has been raised, as to the right to recover the cost of pro-

¹ *P. R. R. v. Zebe*, 33 Penna. St. 318; *Caldwell v. Brown*, 53 Id. 453; *Donaldson v. M. & M. R. R.*, 18 Ia. 280; *I. C. R. R. v. Weldon*, 52 Ill. 290.

² *Blake v. M. Ry.*, 18 Q. B. 93, 83 E. C. L.; *P. R. R. v. Vandiver*, 36 Penna. St. 298; *The State v. B. & O. R. R.*, 24 Md. 84; *K. P. Ry. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245; *N. & C. R. R. v. Stevens*, 9 Heisk. (Tenn.) 12; *Collins v. E. T. V. & G. R. R.*, Id. 841; *B. & O. R. R. v. State to use of Mahone*, 63 Md. 135, 21 Am. & Eng. R. R. Cas. 202; *contra*, *B. & O. R. R. v. Noell*, 32 Gratt. 394.

³ 4 C. B. N. S. 306, 93 E. C. L.

⁴ 13 W. R. 289.

⁵ *P. R. R. v. Zebe*, 33 Penna. St. 318; *P. R. R. v. Bantom*, 54 Id. 495; *C. & P. R. R. v. Rowan*, 66 Id. 393; *Owen v. Brocksmidt*, 54 Mo. 285; *Murphy v. N. Y. C. & H. R. R.*, 88 N. Y. 445, 8 Am. & Eng. R. R. Cas. 490; *Rains v. St. L., I. M. & S. Ry.*, 71 Mo. 164, 5 Am. & Eng. R. R. Cas. 610.

viding mourning for the family, but I cannot see why the same rule of decision should not be applied with regard to that as with regard to the expenses of the interment of the deceased, for funeral ceremonies, and the clothing of the family in black, are alike conventional expressions of respect for the deceased, and of sorrow for his loss, and neither can be said to be done in the performance of a duty imposed by law.

In the United States no deduction is to be made in respect of insurance on the life of the person killed, but a different rule prevails in England.

413. In *Hicks v. N. A. & H. Ry.*,¹ Campbell, C. J., directed the jury that in estimating damages for death they should deduct the amount of a policy recovered from an accident insurance company, and that they should also deduct the sums that the decedent or his family would probably have paid as premiums, had he lived, upon a policy of general life insurance, which he had in force at the time of his death. This case was cited with approval in *Bradburn v. G. W. Ry.*² On the other hand, it has been held in America that no deduction is to be made in respect of policies of general life insurance.³

VI. STATUTORY LIMITATIONS OF DAMAGES.

414. Damages recoverable in case of death are limited by statute, in the hereinafter-mentioned States, to the following amounts: Colorado, \$5,000; Connecticut, \$5,000; Illinois, \$5,000; Indiana, \$5,000; Kansas, \$10,000; Maine, \$5,000; Massachusetts, \$5,000; Minnesota, \$5,000; Missouri, \$5,000; Nebraska, \$5,000;

¹ 4 B. & S. 403, note, 116 E. C. L.

² L. R. 10 Ex. 1.

³ *N. P. R. R. v. Kirk*, 90 Penna. St. 15; *Kellogg v. N. Y. C. & H. R. R. R.*, 79 N. Y. 72.

New Hampshire, \$5,000; New York, \$5,000; Ohio, \$10,000; Oregon, \$5,000; Utah, \$10,000; West Virginia, \$5,000; Wisconsin, \$5,000.

415. The Pennsylvania Act of 4 April, 1868, having limited recovery as against railways to \$3,000 in cases of personal injury not resulting in death, and to \$5,000 in case of death, the Pennsylvania Constitution of 1873 prohibited any statutory limitation in either class of cases. In *C. R. R. v. Cook*,¹ the Act of 1868 was held to be unconstitutional, so far as it limited the damages recoverable in cases not resulting in death, for the reason that the right of recovering such damages being of common law, and not of statutory origin, could not, without violation of the Bill of Rights, be taken away or impaired by statute. This doctrine was reasserted in *13th & 15th St. P. Ry. v. Boudrou*;² but in *C. & P. R. R. v. Rowan*,³ which was decided before the adoption of the Constitution of 1873, it was held that the right of recovering damages for death being of statutory origin, could be impaired or altogether taken away by subsequent statutes, and in *P. R. R. v. Langdon*,⁴ decided after the adoption of the Constitution of 1873, it was held that the limiting Act of 1868 was unaffected by that instrument, so far as regards a railway, which, by its formal acceptance of the Act of 1868, had made that Act a part of its charter, and thereby excepted itself from the operation of the Constitution of 1873. In *P. & R. R. v. Boyer*,⁵ Gordon, J., intimated that a different conclusion would be reached in a case where the railway defendant had not formally accepted the Act of 1868. In *Lewis et al., Receivers of the P. & R. R. R. v. Hollahan*,⁶ it was held that the second section of the

¹ 1 Weekly Notes of Cases (Penn.) 319.

² 92 Penna. St. 475.

³ 66 Id. 393.

⁴ 92 Penna. St. 21.

⁵ 97 Penna. St. 103.

⁶ 103 Penna. St. 425.

Act of 4 April, 1868, has been repealed so far as regards the limitation of recovery against a railway, which had not, prior to the adoption of the Constitution of 1873, accepted that statute, and thereby made it a part of its charter, Sterrett, J., saying, in delivering the judgment of the court: "the case of *P. R. R. v. Langdon*, cited and relied on by plaintiff in error, was well decided on other controlling questions, but we do not see our way clear to follow it as authority on the precise constitutional question involved in this case. One of the questions in that case was as to the effect of acceptance by the company of the Act of 1868. In this case that question does not arise." In the later case of *P., W. & B. R. R. v. Conway*,¹ wherein the record failed to show that the railway had accepted the Act of 1868, Paxson, J., says, in his judgment: "it may not be out of place here to correct a misapprehension of the learned judge below in regard to *P. R. R. v. Langdon*, *supra*. That case has not been overruled as he supposes. Some of the reasoning by which it was supported is not sustained by the later case of *Lewis v. Hollahan*, and as my brethren are wiser than myself, I cheerfully submit to their views. Moreover, if, when the main question comes up again, *P. R. R. v. Langdon* shall be found to be a mistake, it will afford me pleasure to join in overruling it. But the question has not been here since, until the attempt to raise it in the present case. It is, therefore, premature to assume that *P. R. R. v. Langdon* has been overruled. This court has not yet said that the new Constitution, *ipso facto*, repealed charters."

416. Where suit is brought in New York upon a contract of carriage made in that State, and the breach

¹ 17 Weekly Notes of Cases (Penna.) 429.

resulting in personal injuries to the plaintiff was in Pennsylvania, the statute of the latter State, limiting the amount of damages recoverable, will not be enforced in New York.¹

¹ *Dyke v. E. R. R.*, 45 N. Y. 113.

CHAPTER IX.

RELEASES.

- I. The railway's contractual exemption from liability as a carrier.
- II. Releases by the plaintiff, or the person injured.

I. THE RAILWAY'S CONTRACTUAL EXEMPTION FROM LIABILITY AS A CARRIER.

In certain jurisdictions the law, from considerations of public policy, forbids railways, as carriers of passengers, to contract for exemption from responsibility for the results of their negligence.

417. In certain jurisdictions, the law, from considerations of public policy, forbids railways, as carriers of passengers, to contract for exemption from responsibility for the results of their own negligence, or that of their agents or servants. In 1832, Mr. Justice Story, in his commentaries on the Law of Bailments,¹ stated, as the result of the cases up to that time with regard to the right of a common carrier of goods on land to limit his responsibility, that "Lord Coke declared it, in a note to Southcote's case,² and that it was admitted in Morse *v.* Slue.³ It is now fully recognized and settled beyond any reasonable doubt,"⁴ and he added: "still, however, it is to be understood that common carriers cannot, by any special agreement, exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by special notice, exempt themselves from

¹ See. 549.

² 4 Rep. 84.

³ 1 Ventr. 238.

⁴ Nicholson *v.* Willan, 5 East 507; Batson *v.* Donovan, 4 B. & Ald. 39; Riley *v.* Horne, 5 Bingh. 217; Lowes *v.* Kermode, 8 Taunt. 146; Austin *v.* M. S. & L. Ry., 10 C. B. 473, 70 E. C. L.

responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations and qualifications of his rights." In *Peek v. N. S. Ry.*,¹ Blackburn, J., admits the correctness of Judge Story's conclusions, from the decisions up to the date of the publication of his book, saying, "in my opinion the weight of authority was, in 1832, in favour of this view of the law, but the cases decided in our courts between 1832 and 1854, established that this was not law, and that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned of gross negligence, misconduct, or fraud on the part of his servants, and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Act (1854), was because it thought that the companies took advantage of these decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'" Lord Blackburn refers to cases which abundantly sustain this view. Under the Railway and Canal Act, 1854,² it is for the court to determine whether the conditions imposed by the carrier, limiting his liability for the transportation of goods, be or be not just and reasonable, but no statute having thrown a similar protection over contracts for passenger carriage, the law in England as to them is, that the parties are free to make their own contracts, and that the railway may stipulate for exemption from liability for all injuries to a passenger, whether caused by the negligence of its servants or otherwise; thus, in *McCawley v. The F. Railway*,³ it was held on demurrer, that a plaintiff travelling under a free pass, which, in terms, stipulated that the "plaintiff should travel at his own risk," cannot recover for injuries caused by the

¹ 10 H. L. 473.

² 17 & 18 Vict. c. 31.

³ L. R. 8 Q. B. 57.

railway's "gross and wilful negligence." In *Hall v. N. E. Ry.*,¹ the plaintiff, who travelled under a drover's ticket issued by the N. B. Ry., for a journey from Angerton to Newcastle, the line of the N. B. Ry. terminating at Morpeth, where the line of the defendant company began, the ticket stipulating the plaintiff should travel at his own risk, and the plaintiff having been injured between Morpeth and Newcastle on the defendant's line, owing to the negligence of the defendant's servants, it was held that the ticket bound the plaintiff to travel at his own risk during the whole of the journey, and that the defendant was protected upon its line as effectually as the N. B. Ry. was protected upon its line. In *Gallin v. L. & N. W. Ry.*,² the plaintiff travelled on the defendant's line as a drover with cattle, under a pass stipulating that he should travel at his own risk, and the train arrived at its terminus after dark, and the plaintiff's car was stopped on a bridge with a low and dangerous parapet, the plaintiff, in alighting, fell over the parapet and was injured, and it was held that the terms under which the plaintiff travelled exempted the railway from liability to him, not only during the actual transit, but also while he was leaving the railway premises. In *Burke v. S. E. Ry.*,³ the plaintiff bought from the railway a book of coupons entitling him to travel between London and Paris. On the second page of this book there was printed a condition limiting the railway's responsibility to its own trains, and the plaintiff having been injured in a French train, the railway rested its defence on the condition. It was held that the whole book was the contract accepted by the plaintiff, and that he could not reject the condition exempting the railway from liability.

¹ L. R. 10 Q. B. 437.

² 5 C. P. D. 1.

² L. R. 10 Q. B. 212.

Henderson *v.* Stevens,¹ was distinguished on the ground that in that case the contract was printed on the front of the ticket, and the notice limiting the defendant's liability was printed on the back of the ticket, and was not proved to have been brought to the attention of the plaintiff.²

418. The weight of American authority, however, is decidedly in favour of the proposition, that, while a carrier of goods may by contract, or even by notice brought home to the shipper of goods, limit his liability, yet he cannot by stipulation exempt himself from responsibility for his own negligence or that of his servants.³ In the United States the same rule is generally enforced in cases of contracts for the carriage of passengers, whether the passengers be carried by the railway, for the ordinary and legally established rate of fare, or for a lower rate of fare, or even without the payment of any fare.⁴ The English rule is followed

¹ L. R. 3 H. L. Sc. & Div. 470.

² See, also, Duff *v.* G. N. Ry., 4 Law Rep. Ireland 178.

³ Beckman *v.* Shause, 5 Rawle 179; Laing *v.* Colder, 8 Penna. St. 479; Atwood *v.* Reliance Transportation Co., 9 Watts 87; C. & A. R. R. *v.* Baldauf, 16 Penna. St. 67; Bingham *v.* Rogers, 6 W. & S. 495; Amer. Express Co. *v.* Second National Bank of Titusville, 69 Penna. St. 394; Empire Trans. Co. *v.* Wamsutta Oil Co., 63 Id. 14; Farnham *v.* C. & A. R. R., 55 Id. 62; N. J. S. Nav. Co. *v.* Merchants' Bank, 6 How. 344; Dorr *v.* N. J. S. Nav. Co., 4 Sandf. S. C. 136; Stoddard *v.* L. I. Ry., 5 Id. 180; Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Id. 362; Welsh *v.* P., C. & St. L. Ry., 10 Id. 75; Knowlton *v.* Erie Ry., Id. 260; Fillibrowne *v.* G. T. Ry., 55 Me. 462; Sager *v.* Portsmouth, 31 Id. 228; School District *v.* B. H. & E. R. R., 102 Mass. 552; I., P. & C. R. R. *v.* Allen, 31 Ind. 394; Berry *v.* Cooper, 28 Ga. 543; Stahl *v.* Townsend, 37 Ala. 247; S. Ex. Co. *v.* Crook, 44 Id. 468; S. Ex. Co. *v.* Moon, 39 Miss. 822; N. O. M. Ins. Co. *v.* N. O., J. & G. N. R. R., 20 La. An. 302; York *v.* Central R. R., 3 Wall 113; Walker *v.* Transportation Co., Id. 150; Express Co. *v.* Kuntze, 8 Wall. 342.

⁴ N. Y. C. R. R. *v.* Lockwood, 17 Wall. 357; G. T. Ry. *v.* Stevens, 95 U. S. 655; P. R. R. *v.* McCloskey, 23 Penna. St. 526; P. R. R. *v.* Henderson, 51 Id. 315; L. & B. R. R. *v.* Chenewith, 52 Id. 382; P. R. R. *v.* Butler, 57 Id. 336; B., P. & W. R. R. *v.* O'Hara, 12 Weekly Notes of Cases (Penna.) 473; Graham *v.* P. R. R., 66 Mo. 536; Jacobus *v.* St. P. & C. R. R., 20 Minn. 125; I. R. R.

in Canada,¹ and in Ireland,² and also in New York.³ The case of *Smith v. N. Y. C. R. R.*,⁴ where the railway is held liable, is only distinguishable from the latter cases upon the ground that in that case the contract of exemption was general in its terms, and did not specify as a ground of exemption the negligence of the defendant or its servant, but in effect Smith's case must be held to be overruled as an expression of the law in New York by the later cases in that State. There are also some other cases in which the English and New York cases are followed.⁵

419. Where the passenger is to be carried also over a connecting line, the limitation of liability made by contract with the original carrier, when available to protect the contracting line, avails also to protect the connecting line.⁶ A contract in terms exempting a railway from responsibility for "damage" or "risks" to the passenger will not be so construed as to relieve the railway from liability for the results of negligence

¹ *Monday*, 21 Ind. 48; *Arnold v. I. C. R. R.*, 83 Ill. 273; *I. C. R. R. v. Read*, 37 Id. 484; *Warren v. F. R. R.*, 8 Allen 227; *C. P. & A. R. R. v. Curran*, 19 Ohio St. 1; *Rose v. D. M. V. R. R.*, 39 Iowa 246; *M. & O. Ry. v. Hopkins*, 41 Ala. N. S. 486.

² *Sutherland v. G. W. Ry.*, 7 Up. Can. (C. P.) 409; *Alexander v. N. Ry.*, 33 Up. Can. (Q. B.) 474, 35 Id. 453.

³ *Johnson v. G. W. & S. Ry.*, 9 Irish Rep. C. L. 108.

⁴ *Wells v. N. Y. C. R. R.*, 24 N. Y. 181; *Perkins v. N. Y. C. R. R.*, Id. 196; *Bissell v. Same*, 25 Id. 442; *Poucher v. Same*, 49 Id. 263; *Cragin v. Same*, 51 Id. 64; *Stinson v. Paine*, 32 Id. 333; *Blair v. E. Ry.*, 66 Id. 313.

⁵ 24 N. Y. 222.

⁶ *Ashmore v. Penna. Trans. Co.*, 28 N. J. L. 180; *Kinney v. C. R. R.*, 32 Id. 407; *Hall v. N. J. S. N. Co.*, 15 Conn. 539; *Beck v. Weeks*, 34 Id. 145; *Lawrence v. N. Y. & N. H. R. R.*, 36 Id. 63; *Kimball v. R. & B. R. R.*, 26 Vt. 247; *Mann v. Preacher*, 40 Id. 332; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Adams Ex. Co. v. Brooks*, Id. 458; *Illinois R. R. v. Adams*, Id. 474; *Hawkins v. G. W. R. R.*, 17 Mich. 57, 18 Id. 427; *B. & O. R. R. v. Bregy*, 32 Md. 333; *Brehme v. Adams Ex. Co.*, 25 Id. 328; *Levering v. Union Trans. Co.*, 42 Mo. 88.

⁶ *Hall v. N. E. Ry.*, L. R. 10 Q. B. 437.

on its part.¹ In order to relieve the railway from liability for the results of its negligence, the contract for its exemption must have been made with or accepted by the person injured; thus, where a mail agent was killed while travelling in charge of mails under a contract between the railway and the government, it was held that a condition of exemption in the pass given to and used by the agent was inoperative, because the agent's right to free and safe transportation was absolute under the contract between the railway and the government.² It has been held in Illinois that a railway, which runs a sufficient number of passenger trains for the accommodation of the public, being under no legal obligation to carry passengers on its freight trains, may contract for a limitation of liability in cases of passengers so carried, provided that equal terms are held out to all offering themselves to be so carried.³ Where a passenger is carried for a valuable consideration, his use of a pass containing conditions exempting the railway from liability for negligence will not estop him from proving that he was not subject to those conditions.⁴

420. While it must be admitted that, as a general rule, parties to contracts may, as they please, assume obligations or limit their rights, yet it may well be contended, in the light of public policy and with a just appreciation of the character and magnitude of railway operations, that railways ought not to be permitted in all cases to contract for exemption from the legal consequences of their negligence. In *G. T. Ry. v. Stevens*,⁵ Bradley, J., pertinently says: "it is often asked with

¹ *N. J. S. N. Co. v. Merchants' Bank*, 6 How. 344; *Smith v. N. Y. C. R. R.*, 24 N. Y. 222; *M. & O. Ry. v. Hopkins*, 41 Ala. 489.

² *N. Y., L. E. & W. R. R. v. Seybolt*, 95 N. Y. 562.

³ *Arnold v. I. C. R. R.*, 83 Ill. 273.

⁴ *G. T. Ry. v. Stevens*, 95 U. S. 655.

⁵ 95 U. S. 660.

apparent confidence, may not men make their own contracts? or, in other words, may not a man do what he will with his own?" The question at first sight seems a simple one, but there is a question lying behind that. "Can a man call that absolutely his own which he holds as a great public trust, by the public grant, and for the public use as well as for his own profit?" Railways do not deal with the public at arm's length, nor upon equal terms. The exigencies of business and the conditions of modern life compel individuals to avail themselves of the facilities which railways offer, and to accept the terms which railways dictate. Therefore, that which is in legal form a contract between the railway and its customer is possibly the result of coercion rather than of agreement, and, for that reason, should be looked upon with suspicion, if its effect be to release the railway from usual and reasonable obligations. The law exacts damages for breaches of contract and other violations of duty chiefly in order to compensate, in so far as possibly can be, the injured party for the wrong that has been done to him; and no one can doubt that public policy demands not only that every wrong should be legally redressed at the cost of the wrongdoer, but also that that redress should so inevitably and so promptly follow upon the commission of the wrong, that the certainty of its exaction will be an ever-present warning not to do a like wrong. It is also to be remembered that inasmuch as railways are common and public, and not private or special, carriers, any one act of negligence, which is the cause of injury to one passenger or forwarder of goods, may at the same time be the cause of the like or greater injury to other customers of the railway. It is, therefore, to the benefit of the public that all proprietors, managers, and servants of railways should realize that every act of negligence on

the part of the railway will, of necessity and without exception, render the railway responsible in damages to the party injured thereby, if that party be himself without fault. This line of argument is forcibly stated by Bradley, J., in his judgment in *N. Y. C. R. R. v. Lockwood*.¹ Therefore, when a railway, in the exercise of its charter powers, receives a passenger for transportation upon payment of its ordinary and legally established rate of fare, or for any consideration, pecuniary or otherwise, which it accepts as the equivalent of that fare, it may well be contended that considerations of public policy forbid the railway to enter into a contract with that passenger which shall have the effect of relieving the railway from responsibility for the consequences of its negligence. But these considerations do not apply to a case where the railway offers to the passenger a free choice between the alternatives of, on the one hand, transportation at the ordinary and legally established rate of fare, with liability upon the part of the railway to indemnify him against the consequences of its negligence, and, on the other hand, transportation at a lower rate of fare, or without any charge, upon condition that the railway be exempted from liability for its negligence. If, under such circumstances, the passenger voluntarily accepts the last-mentioned alternative, considerations of public policy obviously do not forbid the railway to avail itself of that exemption from liability, whose insertion as a condition of the contract was, either partly or wholly, the consideration for the transportation of the passenger for less than the ordinary rate of fare. This view was clearly put in *Kenney v. C. R. R. of N. J.*,² where the railway was held not to be liable to one who was killed by its negligence

¹ 17 Wall. 357.

² 34 N. J. L. 513.

while being carried as a passenger under a free pass, which in terms exempted the railway from liability for the results of its negligence. Van Syckel, J., thus stated the grounds of the judgment: "the deceased did not choose to bargain with them in their general employment, in which they hold themselves ready to transport passengers for hire, but asked and accepted from them a gratuity. To hold otherwise would be to say that a man, from the mere fact that his occupation is that of a common carrier, cannot, as to an individual transaction, be a gratuitous bailee. The company, therefore, in asking immunity against loss in this case, does not seek to escape from any part of its common-law liability. The objection that this contract is inconsistent with good morals and sound policy has been considered in all the cases of this kind which have been submitted to judicial criticism. It differs widely from the question, whether a person should be allowed to stipulate against loss from his own negligence. Reasons of great cogency could be stated against the validity of such a contract, which can have no pertinency to this issue. The doctrine of *respondeat superior* has not been adopted, because there is any equity in imposing the loss upon the superior, but in order to induce the principal to use greater care in the selection, and to exercise increased watchfulness over the acts and conduct of his agents. While it may with great force be urged that the policy which dictates this rule would be infringed by permitting a railroad company, in the pursuit of its ordinary business, to contract for immunity from such loss, it is difficult to perceive how this consideration can apply to a transaction without their ordinary employment, to a mere gratuity or accommodation, which concerns none but the immediate parties to it. Why should the passenger who solicits a free pass be permitted to

escape the liability to loss, which he voluntarily assumes in order to secure the accommodation? It is certainly a breach of good faith in the passenger to attempt to fix the carrier with responsibility in such case. * * * The damage in this case resulted from the fault, not of the directors of the company, but from that of its subordinate agents, and no satisfactory reason has been given why the contract, which the parties themselves made, should be restrained of its full operation."

421. Of course, where a real freedom of choice between the alternatives is not offered to the passenger, the condition of exemption ought not to protect the railway. This view is supported by the case of *N. Y. C. R. R. v. Lockwood*, *supra*, where the plaintiff, having shipped cattle under a contract providing for the transportation of his cattle at less than tariff rates, and binding him to attend to the loading and transportation and unloading of the cattle, and to take all risk of injury to them, and of personal injury to himself or to whomsoever travelled with the cattle, and having received a pass certifying that he had shipped sufficient stock to pass free, but binding him to waive all claims for damages or injuries, was injured by the negligence of the railway's servants, it being proven at the trial that the tariff rates were about three times the ordinary rates charged, and that the usage of business was for all drovers to ship cattle under agreements similar to that made by the plaintiff, judgment upon a verdict for the plaintiff was affirmed in error.

II. RELEASES BY THE PLAINTIFF, OR THE PERSON INJURED.

Subject to the qualifications stated, either the person injured or the plaintiff may release his right of action either before or after the injury.

422. Either the plaintiff, or the person injured, may bind himself and his privies by his release of the cause of action if made upon an adequate consideration, and with a full knowledge of its legal effect. But a release will not bind the person injured which he was induced to sign by false representations made by an officer of the railway that his injuries were slight, and that if they should ultimately become serious he would, notwithstanding the release, be in a position to obtain further compensation from the railway.¹ So, a release may be set aside by proof that at the time it was executed, the party releasing his claim was insane, and, if he subsequently became sane, did not ratify it.² Whether or not a release of a claim for damages has been obtained through fraud is a question for the jury, and the burden of proving the fraud is on the plaintiff;³ but in order to warrant the submission of the issue on that point to the jury, the evidence of the fraud must be clear and indubitable.⁴ A refusal upon the part of a passenger who has been injured to pay his fare, and an assent thereto upon the part of the carrier, does not amount to a settlement of the passenger's claim for damages for the injury, nor estop the passenger from asserting and enfor-

¹ Hirschfeld v. L. B. & S. C. Ry., 2 Q. B. D. 1.

² George v. St. L., I. M. & S. R. R., 34 Ark. 613, 1 Am. & Eng. R. R. Cas. 294; Dixon v. B. C. & N. R. R., 100 N. Y. 170.

³ Hawes v. B., C. R. & N. R. R., 64 Iowa 315, 19 Am. & Eng. R. R. Cas. 220; C. R. I. & P. Ry. v. Lewis, 109 Ill. 120, 19 Am. & Eng. R. R. Cas. 224; Busian v. M., L. S. & W. Ry., 56 Wisc. 325, 10 Am. & Eng. R. R. Cas. 716.

⁴ P. R. R. v. Shay, 82 Penna. St. 198.

ing such a claim.¹ It has been held that where a passenger has sued his carrier and also the owner of a colliding carriage his release or discharge of the carrier will bar his action against the other defendant.²

423. A release by the person injured will bind those who, after his death, sue for the damages caused to them by his death; thus, in *Read v. G. E. Ry.*,³ a widow having brought suit under Lord Campbell's Act the defendant pleaded that in the lifetime of the decedent "the defendants paid him, and he accepted, a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the defendants," and on demurrer judgment was entered for the defendant, Lush, J., saying: "the intention of the statute is, not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim *actio personalis moritur cum persona* would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer. It is true that s. 2 provides a different mode of assessing the damages, but that does not give a fresh cause of action."

424. A person may also bind himself and his privies before receiving any injury by his stipulation that, if injured, he will not claim damages; thus, in *Griffith v. The Earl of Dudley*,⁴ the widow of a workman suing under the Employer's Liability Act, 1880, for damages caused to her by the death of her husband was held to be barred by his contract with his employer, made upon a valuable consideration for himself and his representatives and any person entitled, in case of his death, not to claim any compensation under the Act for personal

¹ *M. Packet Co. v. Clough*, 20 Wall. 528.

² *Burton v. Price*, 57 Cal. 272.

³ *L. R. 3 Q. B. 555.*

⁴ 9 Q. B. D. 357.

injury whether resulting in death or not.¹ On the other hand, in *K. P. Ry. v. Peavey*,² the facts were that the Kansas statute³ subjected the railway to liability to its servants for injuries caused by the negligence of their fellow-servants, that after the passage of that Act the plaintiff entered into the service of the railway, and signed a written release stipulating that in consideration of the wages to be paid to him he would not hold the railway liable in damages for injuries caused to him, *inter alia*, by the negligence of his fellow-servants, and that the plaintiff was injured by such negligence; and the court held the release void because against public policy, and entered judgment against the railway. Horton, C. J., thus states the ground of decision: "the State has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy, and the rule holds equally good if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void." The fallacy in this line of reasoning is obvious; the relation between the railway and its servants is purely voluntary and contractual; the servant is not compelled to enter the service of the

¹ See also *W. & A. R. R. v. Bishop*, 50 Ga. 465; *Galloway v. W. & A. R. R.*, 57 Id. 512; *W. & A. R. R. v. Strong*, 52 Id. 461; *Hendricks v. W. & A. R. R.* Id. 467.

² 29 Kans. 169, 11 Am. & Eng. R. R. Cas. 260.

³ Ch. 93, Laws of 1874.

railway, and the conditions of his service are the result not of coercion, but of compact, and the railway is, therefore, as much entitled to insist upon a release of damages by pre-contract, as it is entitled to insist that the servant's pay shall be two, three, or five dollars a day, instead of twenty, thirty, or fifty dollars a day. There is, in principle, an obvious distinction between the relation which the railway holds to its servants and that which it holds to persons not contractually connected with it, and even to passengers who deal with it on the basis of its quasi-public status.

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